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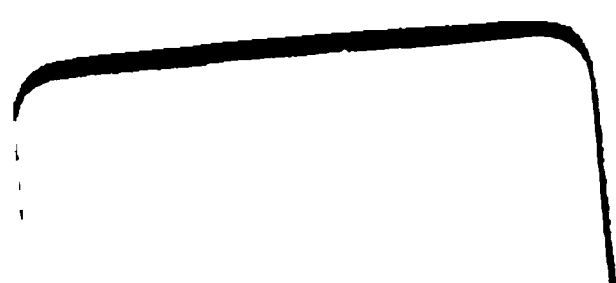
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AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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AMERICAN STATE REPORTS

VOL. LXXXVI

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VOL. LXXXVI.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

ROBERTS v. BURNS.
[48 W. Va. 92, 35 S. E. 922.]

AN ATTACHMENT ON CLAIMS NOT DUE can be maintained in equity under the statutes of West Virginia, against an absconding debtor, by the accommodation maker of a negotiable note, which he has not yet paid, if he is absolutely bound to pay it when it becomes due. (p. 21.)

AN AFFIDAVIT FOR AN ATTACHMENT MUST NOT BE IN THE ALTERNATIVE.—Hence an affidavit stating that some one or more of the following grounds for an attachment exist, and then stating five separate grounds, is fatally defective. (p. 22.)

ATTACHMENT—AFFIDAVIT, FACTS IN, HOW TO BE STATED.—The statement of material facts in an affidavit for an attachment must be certain and definite in legal point of view, so as to inform those entitled to defend the attachment what particular facts they must repel. (p. 22.)

ATTACHMENT ON THE GROUND OF FRAUD IN CONTRACTING THE DEBT SUED UPON cannot be sustained by evidence that the defendant made misrepresentations for the purpose of excusing his nonpayment of a pre-existing debt, especially if it is not shown that the claim sued upon was contracted in consequence of such statements. (p. 23.)

AN ATTACHMENT CANNOT BE MAINTAINED ON THE GROUND THAT DEFENDANT IS DISPOSING OF HIS PROPERTY WITHOUT APPLYING THE PROCEEDS to the payment of the debt sued upon, as he had promised to do. (p. 23.)

Van Winkle & Ambler, and Mason G. Ambler, for the appellants.

V. B. Archer, for the appellee.

Am. St. Rep., Vol. LXXXVI—2 (17)

⁹² ENGLISH, J. On the first day of June, 1898, George W. Roberts filed his affidavit and bond for an attachment, returnable to August term, 1898, against David Burns and Gideon Burns, partners, doing business under the name of Burns Brothers, and others, in the circuit court of Wood county, and sued out an order of attachment against the estate of said Burns Brothers to pay the sum of two ⁹³ thousand dollars and costs. The order of attachment was levied upon certain real estate in Wirt county, and certain personal property belonging to said defendants. At the July rules, 1898, the plaintiff filed his bill in the cause, in which he alleged that the defendants, Burns Brothers, who had been in the timber and manufacturing lumber business on the Little Kanawha river, had become indebted to him for supplies furnished them, and by taking up their orders, he took from them, for their accommodation, four notes, for five hundred dollars each, dated, respectively, March 17, March 28, April 28, and May 10, 1898 all of which notes were negotiable, and payable ninety days after their dates at the Citizens' National Bank of West Virginia, at Parkersburg, which notes were discounted at that bank, and none of them were due at the time said suit was instituted and said order of attachment sued out. The plaintiff, in his affidavit, describes said notes; states that they are not due, and when they will become due, and that he believes some one or more of the following grounds exist for an attachment against the property of said Burns Brothers: That they are about to remove their property, or the proceeds of its sale, or a material part of said property or the proceeds, out of this state, so that process of execution or judgment in such suit, when it is obtained, will be unavailing; that said defendants are converting, or are about to convert, their property, or a material part thereof, into money or securities, with the intent to defraud their creditors; that said defendants have assigned or disposed of their property, or a material part thereof, or are about to do so, with intent to defraud their creditors; that the said defendants have property or rights in action which they conceal; and that they fraudulently contracted the debt or incurred the liability for which the plaintiff's action was about to be brought.

The material facts relied on by plaintiff to show the existence of the grounds upon which his application for attachment was based are stated briefly as follows: That defendants had been engaged in the lumber business at Elizabeth, Wirt county, on the Little Kanawha river. That they also had an interest

in a certain mill on the Great Kanawha, below Charleston. That the company was called the Burns Lumber Company. That, about the time plaintiff's account was opened, one of the defendants informed him that Burns Brothers were furnishing timber and supplies to said Burns Lumber Company, and creating liabilities, by reason of their operations on the Little ⁹⁴ Kanawha river; stating to plaintiff that their reasons for not paying his debt and reducing their liabilities were that they were using their means to furnish supplies to said Burns Lumber Company, and that they had sufficient property there to meet their obligations arising out of the transaction on the Little Kanawha, when such statements were not true, but, on the contrary, said Burns Brothers were liable in a large sum of money to said Burns Lumber Company. That said Burns Lumber Company was insolvent, and had made an assignment for the benefit of its creditors. That the Burns Lumber Company, or some of its agents, had instituted suit in the United States circuit court against said Burns Brothers, claiming a large sum of money (something over thirty thousand dollars), as liability against Burns Brothers growing out of their transactions with the parties owning or controlling said Burns Lumber Company. That credit was given by the plaintiff to said defendants on the strength of their statements that they had large interests in the business of the Burns Lumber Company—large enough to pay the debts of the firm of Burns Brothers, including that of the plaintiff. That in the autumn of 1896, W. E. Fleming, a trusted agent of Burns Brothers, made false statements to plaintiff as to the timber trees owned by them, claiming they were worth one hundred thousand dollars, and by reason of such statement credit was extended to defendants. That said Burns Brothers have sold their timber on the Little Kanawha river, which they intended to manufacture into lumber, to the Parkersburg Mill Company, which timber would amount to fifteen or twenty thousand dollars, out of which they paid plaintiff a note of only five hundred dollars, and have received the entire proceeds of said timber sale. That credit was extended to them upon the faith that they would manufacture said lumber at their mill at Elizabeth, and that, by false representations and statements of said defendants that they had ample property and means to pay their debts, plaintiff was led to credit said defendants. The plaintiff, in his bill, also sets forth the same facts, in substance, as were stated as facts relied on in the affidavit to support the order of attachment. The defend-

ants, Burns Brothers, demurred to the plaintiff's bill, which demurrer was overruled; and thereupon they filed their answer, denying the material allegations of the bill. On the 15th of August, 1898, the defendants, by their counsel, moved the court to quash the attachment in this cause, and to annul and set aside the order of ⁹⁵ attachment issued herein, which motion, being considered by the court, was overruled, and the defendants excepted; and thereupon the Citizens' National Bank appeared by counsel, and moved to be admitted a party defendant to this suit, which motion was granted, and leave given said bank to answer. The defendants thereupon applied for and obtained this appeal, claiming that it was error in the court to refuse to quash said attachment, to sustain an attachment brought by an indorser contingently liable before maturity on commercial paper held and owned by a third party, to hold that the material facts stated were sufficient to support the grounds alleged, and to permit the plaintiff to maintain the attachment and suit based thereon.

Counsel for the appellants insist, first, that because the claim sued for was not due, and was not owned by or owed to the plaintiff, he could not sustain this attachment. It is true that the claims upon which this suit was predicated were not due at the time the attachment was sued out, and that they had been indorsed by the plaintiff, George W. Roberts, to the Citizens' National Bank; yet can we say that for these reasons said Roberts was precluded from maintaining an attachment in equity, based upon proper affidavit, against the makers of said notes? We cannot say that either Roberts or the Second National Bank were entitled to recover the proceeds of said four notes on the day this attachment proceeding was instituted, but our statute (Code, c. 106, sec. 1) provides that an attachment may be sued out in a court of equity for a debt or claim, legal or equitable, whether the same be due or not, upon any of the grounds aforesaid, but the affidavit, in case the claim or debt be not due, must show when it will become due.

It is further insisted by counsel for the appellants that the plaintiff, Roberts, has no right to recover the money, and, if he succeeded in getting it, there would be no assurance that he would ever discharge the notes. In response to this position, attention is called to the fact that, at the time of suing out said order of attachment, the plaintiff executed a bond, with approval security, in the penalty of four thousand dollars, conditioned, among other things, to pay all costs and damages

which might be awarded against him, or sustained by any person, by reason of suing out said order of attachment, which bond would protect said bank in the event said Roberts received and misapplied the proceeds of the property levied on under said order of attachment, ⁹⁶ and it could not be recovered from said Roberts. This, however, is a chancery proceeding, and, if said bank is not already a party thereto, it can be made such, and its interests in the premises fully protected. The proceeding by way of attachment is ancillary in its character. The statute provides that "when any action at law or suit in equity is about to be or is instituted for the recovery of any claim or debt arising out of contract," etc., "the plaintiff may have an order of attachment, etc., . . . and such attachment may be sued out in a court of inquiry for a debt or claim, legal or equitable, whether the same be due or not": Code, c. 106, sec. 1. Where the suit is in equity, the plaintiff may, by the pleadings, aid in the proper disposition of the property levied under the order of attachment, if proper allegations are made in the bill. In the case at bar the plaintiff seems to have entirely overlooked the rights of the Second National Bank to the claims sued on, and prays that he may have a decree against the defendants for the sum of two thousand dollars and costs, and that the land and property attached may be decreed to be sold, and the proceeds applied in payment of plaintiff's claim and costs. It also appears that, though a portion of said notes have matured since the institution of said suit, none of them have been paid, so far as appears, and there is nothing in the bill to indicate a desire on the part of the plaintiff that said bank should be decreed any portion of said proceeds.

Returning to the question raised as to the right of the plaintiff to sue out this order of attachment before the claims sued on are due, we find it held in *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409, that "an attachment can be sued out in equity against an absconding debtor by the accommodation maker of a negotiable note not yet due, although such maker has not yet paid such note, as he is absolutely bound to do so when it becomes due." We cannot distinguish that case, in principle, from the one under consideration. Roberts was payee in the notes, and in discounting them became the indorser to the bank, and liable to pay the same in the event the makers failed so to do, and had to file a bill in the nature of a bill *quia timet* to protect himself and the bank to which he had indorsed the paper. This court has uniformly held that the

proceeding by way of attachment is a creature of the statute, and in derogation of the common law, and, to be made effective, must be strictly pursued. The province of the ⁹⁷ attachment is to seize and secure the property of the debtor until it can be properly applied in satisfaction of his indebtedness. It is always regarded as a harsh remedy, and consequently the proceedings upon which it is based are closely scrutinized, and confined within the letter of the statute. Can we say that the affidavit filed for an attachment by the plaintiff in this case is sufficient? Affiant states that he believes that five different grounds exist for an attachment. By prefacing this statement with the words "some one or more of the following grounds," is not the effect precisely the same as if each ground stated was prefixed by the word "or"? Some one or more of the grounds form the base of the application for an attachment, but which one or how many does not appear. 1 Shinn on Attachments, section 146, says: "An averment that the debtor is about removing or is so concealing his effects as to defeat the creditor, or that the defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of creditors, is not sufficient, being in the alternative": See *Dintruff v. Tuthill*, 62 Hun, 591, 17 N. Y. Supp. 556; *Cronin v. Crooks*, 143 N. Y. 352, 38 N. E. 268; *Drake on Attachments*, 6th ed., sec. 101a. While the affidavit may state as many grounds of attachment as the statute allows, it will be defective if it states two or more of them disjunctively: 3 Ency. of Pl. & Pr. 22. So, in the case of *Sandheger v. Hosey*, 26 W. Va. 223, Snyder, Judge, speaking for the court, said: "An affidavit alleging one or the other of two or more distinct grounds would be bad, because of the impossibility of determining which is relied on to sustain the attachment." Nothing could be more indefinite than the expression used in this case: "Affiant further says that he believes that some one or more of the following grounds exist," etc.

We next come to consider the question raised as to whether the material facts relied on in said affidavit are such as the law requires, and sufficient to sustain the truth of the grounds relied on to obtain the attachment. It may be well to examine the rule which has been applied to attachments, with reference to this portion of the affidavit, by this court. In *Goodman v. Henry*, 42 W. Va. 527, 26 S. E. 528, it is held that "a statement of material facts in an affidavit for attachment must be certain and definite, in a legal point of view, so as to inform those en-

titled to defend the attachment what particular facts they must "repel": See, also, *Hale v. Donahue*, 25 W. Va. 414. ⁹³ After stating that Burns Brothers had been in the lumber business in Wirt county, and also interested in the mill known as the Burns Lumber Company, on the Great Kanawha, he states that some time during last autumn (the affidavit bears date June 1, 1898), at the time plaintiff's account was opened, and in a conversation plaintiff had with one of the defendants (which one of eight is not mentioned), plaintiff was informed that Burns Brothers were furnishing timber and supplies to the Burns Lumber Company, and creating liabilities, by reason of their operations on the Little Kanawha; that the reason they did not pay his debt was that they were using their means to furnish supplies to said lumber company; that they had sufficient property there to meet their obligations arising out of the transactions on the Little Kanawha—which statements were not true. Now, this conversation, even if had with Burns Brothers, or either of them, applied to debts then existing, which they owed plaintiff, because they assigned this excuse for not paying plaintiff's claim against them, and could not be used to support the ground that they fraudulently contracted the account then opened; and that is the only ground to which it could have the most remote application. As to affiant's statement that credit was extended Burns Brothers by reason of this conversation, there is nothing in the affidavit that asserts that the claim sued on was created in consequence thereof. As to the false statement attributed to W. E. Fleming, as made in the fall of 1896, there is nothing in the affidavit that shows that Burns Brothers had any knowledge that such statement was made, or that Fleming had any authority from them to make the same.

Affiant further relies on the statement the Burns Brothers sold their timber in Parkersburg for twenty thousand dollars, instead of manufacturing it at Elizabeth, on the Little Kanawha. This they had a perfect right to do, if, in their judgment, it would yield them more money; but, says affiant, they only paid him five hundred dollars out of the proceeds. No promise is alleged that they would do otherwise, and, while this portion of the affidavit may be true, it constitutes no ground for an attachment. See *Delaplain v. Armstrong*, 21 W. Va. 215, in which the defendants were disposing of their property without applying the proceeds to the payment of plaintiff's debt, as they promised; and Johnson, J., speaking for the court, says: "This statement amounts to an averment that the defendants

have not paid the plaintiff's debt, as they promised to do. This is a common complaint. ⁹⁹ But it is certainly not of the character which authorizes an attachment." The affidavit shows that Burns Brothers were not alone indebted to plaintiff, and in paying him five hundred dollars they may have acted fairly and honestly among their creditors. This statement of material facts in the affidavit does not, in my view, conform to the standard prescribed in *Goodman v. Henry*, 42 W. Va. 527, 26 S. E. 528.

In my view of the case presented by the record, the circuit court erred in overruling the motion to quash the attachment sued out in this cause. The affidavit being insufficient, the attachment should have been quashed; and the plaintiff, by his bill, not having shown himself entitled to the proceeds of the notes sued on, but, on the contrary, that they were the property of the Second National Bank of Parkersburg, and equity only having taken jurisdiction by reason of the attachment, the defendants' demurrer should have been sustained.

The decree is reversed and the bill dismissed.

Attachment.—Although a debt is not due, a writ of attachment may issue if circumstances are such as to justify it: *Humphreys v. Sutcliffe*, 192 Pa. St. 336, 73 Am. St. Rep. 819, 43 Atl. 954.

Attachment.—A sufficient affidavit is essential to support a writ of attachment: *Beebe v. Morrell*, 76 Mich. 114, 15 Am. St. Rep. 288, 42 N. W. 1119. See, also, *Miller v. White*, 46 W. Va. 67, 76 Am. St. Rep. 791, 33 S. E. 332. An affidavit stating in the alternative two separate grounds of attachment is bad, and an attachment sued thereon will be set aside: *Guile v. McNanny*, 14 Minn. 520, 100 Am. Dec. 244. See, further, the monographic note to *Fridenberg v. Pierson*, 79 Am. Dec. 167-172, on the requisites of the affidavit in attachment proceedings.

FARMERS' BANK v. GOULD.

[48 W. Va. 99, 35 S. E. 878.]

EXECUTION SALE, WHAT NOT SUBJECT TO.—PROPERTY HELD IN TRUST cannot be subjected to the payment of a judgment against the trustee. (p. 25.)

FRAUDULENT TRANSFERS—VOLUNTARY CONVEYANCE, WHAT IS NOT WITHIN THE MEANING OF THE LAW AGAINST.—One who receives a conveyance for the purpose of delaying or defrauding creditors of the grantor is not guilty of making a voluntary conveyance, if he reconveys the property to such grantor. (p. 26.)

FRAUDULENT TRANSFER.—THE CREDITORS OF THE GRANTEE OF A CONVEYANCE, MADE IN FRAUD OF CREDITORS have no right, where they have not acquired any lien, nor given credit on their faith in his ownership of the property, to insist on his retaining such property, and hence cannot assail his reconveyance thereof to the grantor, as a fraud upon them. (pp. 26, 27.)

W. S. Meredith and F. T. Martin, for the appellants.

John W. Mason, A. B. Fleming, and R. F. Fleming, for the appellee.

¹⁰⁰ DENT, J. The Farmers' Bank of Fairmont seeks to set aside as fraudulent a deed executed by Jacob N. Gould, deceased, to John E. Gould, his brother, on the thirteenth day of August, 1887, for certain real estate, and subject the same to the payment of a judgment confessed to said bank by the deceased on the twelfth day of August, 1891, for the sum of thirty thousand dollars. The facts are as follows: John E. Gould was the owner of the property in controversy, and, being threatened with litigation in the state of Indiana, owing to an accident occasioned by certain machinery belonging to him, and at the same time being indebted to his brother, Jacob N. Gould, in the sum of about two thousand dollars, he conveyed such property to his brother, in consideration of two thousand five hundred dollars expressed on the face of the deed, for the purpose of securing such indebtedness, and placing the property beyond the reach of the threatened suits, with the understanding that, on request, the brother would deed the property back to him. He afterward paid a portion of the indebtedness and built a new house on the property at a cost of about two thousand two hundred dollars, and, all danger from the Indiana litigation having passed by, his brother, on the thirteenth day of August, 1887, deeded the property back to him. In the meantime Jacob N. Gould, who was the cashier thereof, had become involved in his accounts with the plaintiff bank. The amount of his indebtedness was not known until some years thereafter, and he was believed to be solvent until it was fully discovered. He appears to have been engaged in various speculations, and lost heavily. Some time after he had made the deed to his brother, ¹⁰¹ and after the amount of his defalcation was discovered, he deeded, at the request of the plaintiff, all his property, being of considerable amount, to it, but not sufficient, as shown by his confession of judgment, to cover his shortage.

At the time John E. Gould made his deed to his brother for the property, and at the time of the reconveyance thereof, there was no law in this state against unlawful preferences, but the debtor had the right to prefer such creditor or creditors as he pleased, although such conveyance might operate to hinder, delay, and defeat his other creditors: *Harden v. Wagner*, 22 W. Va. 356. Property held in trust, even after judgment obtained against the trustee, cannot be subjected to the payment of the judgment: *McNeel v. Auldridge*, 34 W. Va. 748, 12 S. E. 851; *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. 591; *Pack v. Hansbarger*, 17 W. Va. 313. Nor does relationship vitiate the transaction, if the proof satisfactorily establishes the bona fides thereof: *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960; *Harden v. Wagner*, 22 W. Va. 356; *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671; *Smith v. Smith*, 48 W. Va. 51, 35 S. E. 876. The proof in this case in direct contravention of the allegations of the bill shows that Jacob N. Gould never had any interest in the property in controversy other than as a mere mortgagee to secure his debt, which has been fully paid off and satisfied. The reconveyance was made before the plaintiff had acquired any right, either at law or in equity, to charge the property with its debt.

The only question, then, is whether the plaintiff, as a creditor of Jacob N. Gould, deceased, has a right to plead the fraud of John E. Gould toward his supposed creditors, to subject the latter's property to the payment of the former's debts; or, in other words, whether the reconveyance of Jacob N. Gould must be treated as a voluntary conveyance, in so far as plaintiff's debt is concerned. Had the plaintiff obtained its judgment before the reconveyance was made, and been able to show that it trusted Jacob N. Gould on the strength of his apparent ownership of the property, there is little doubt but what equity would have held the property liable to its judgment lien: *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302. But neither of these things appears. Its judgment was not obtained until four years after the reconveyance, and suit was not brought until almost five years thereafter. And its confidence in Jacob N. Gould had nothing to do with the property in controversy, but was wholly personal, as shown by the conduct ¹⁰² of the officers of the bank. If, also, the reconveyance could be regarded as strictly voluntary, the property would be liable, under the statute, to plaintiff's debt. But can it be so regarded? It is true that John E. Gould testifies that he made the conveyance

to prevent the enforcement of any judgment against him that might be obtained by reason of his supposed liability incurred in Indiana, but he also testifies, and the circumstances show, that his object was to secure to his brother the just indebtedness he owed him, and give it priority over his Indiana liability. This latter he had the legal right to do, although it resulted in the former. The property always remained in the possession of the mother. She kept boarders, and Jacob N. boarded with her and paid his board. John E. Gould also added large improvements thereto, almost doubling it in value. No attack was ever made on the original transaction, for fraud, nor is there any such allegation contained in plaintiff's bill. The decedent set up no such claim in his lifetime. On the contrary, he faithfully executed the trust.

The law governing this question is stated in 14 American and English Encyclopedia of Law, second edition, 259: "A conveyance of property for the purpose of defrauding the creditors of the vendor, though fraudulent as to them, is valid as to all other persons, and, so long as the vendee holds such property, it is subject to claims of his creditors to the same extent as any other property to which he has title. But, until such creditors obtain a lien upon the property, the vendee's right of alienation is perfect in respect to it, and it is not a fraud upon his creditors for him to reconvey it to his vendor. Until then the creditors of the vendee have no legal or equitable claim in respect to it superior to that of the vendor, and, if the fraudulent vendee reconveys such property to the vendor, it is generally held that the creditors have no right to have the reconveyance set aside as fraudulent": *Second Nat. Bank v. Brady*, 96 Ind. 498; *First Nat. Bank v. Hostetler*, 61 Iowa, 395, 16 N. W. 289; *Clark v. Rucker*, 7 B. Mon. 583; *Cramer v. Blood*, 48 N. Y. 684; *Davis v. Graves*, 29 Barb. 480; *Powell v. Ivey*, 88 N. C. 256; *Stanton v. Shaw*, 3 Baxt. 12; *Peck v. Jones*, 10 Tex. Civ. App. 335, 30 S. W. 382; *Wait on Fraudulent Conveyances*, 398. "In some jurisdictions, however, this right of reconveyance is denied, on the ground that the fraudulent vendor has no equitable claim to the property, and it is held that the creditors of the vendee may, notwithstanding the reconveyance, subject the property to the satisfaction of their claims": *Chaplin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56; *Walton v. Tusten*, 49 Miss. 108 569; *Smith v. Lane*, 3 Pick. 205. Here is a direct conflict of decisions, with the weight decidedly against the contention of the plaintiff. The reconveyance is not voluntary,

in the sense of the law, as being without consideration. On the contrary, it is sustained by full consideration. The vendor is merely trustee of the property for the vendee, the real owner thereof, and equity withholds its aid to enforce a reconveyance, not through want of consideration, but as a penalty to repress and prevent frauds. It does not deny the true ownership, but, because of his unclean hands, it refuses to the owner its aid to regain his property. Having regained his property without its aid before the rights of others have attached thereto, it will protect him in it. Creditors who have not given credit on the strength of the property lose nothing thereby, as their debtor never had any real ownership in the property.

The law might be construed otherwise as to creditors who allege and show themselves to have been defrauded by reason of the title being temporarily in their debtor. This is not made to appear in this case. The plaintiff and the defendant, John E. Gould, both trusted their property in the hands of Jacob N. Gould. John E. Gould received his property, and no more, so far as the pleadings and evidence show. Plaintiff failed to receive its property. This furnishes no reason why John E. Gould should turn over his property to the plaintiff, although he is the brother of the common debtor; for, as the law then stood, he had the right to prefer one creditor to the other, even though such preference might hinder, delay, and defeat the other. He only returned to his brother the property that rightfully belonged to him, as he was in good conscience bound to do, although he was in a position to have legally defrauded his brother for the benefit of his other creditors. Because he did not do this, but saw fit to make his brother whole, and no more, is not the perpetration of fraud against the plaintiff, although thereby hindered from applying John E. Gould's property to the satisfaction of its large judgment. There is nothing in the record showing that John E. Gould was legally or morally bound to pay any portion of the plaintiff's debt, nor to suffer his property to be applied thereon.

For these reasons, the decree complained of is wholly reversed and annulled, and this cause is remanded, to be further proceeded with according to the rules and principles governing courts of equity.

Fraudulent Conveyance.—While the legal title to property remains in a fraudulent grantee, his creditors may subject it to the payment of their debts; but if the fraudulent grantee reconveys to

the fraudulent grantor before any lien attaches in favor of the creditors of the former, they cannot subject the property to their debts: *Blocchi v. Casey-Swasey Co.*, 91 Tex. 259, 66 Am. St. Rep. 875, 42 S. W. 963. Compare *Chaplin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56.

STATE v. ALLEN.

[48 W. Va. 154, 35 S. E. 990.]

ATTACHMENT.—ONE IS A NONRESIDENT WITHIN THE MEANING OF THE ATTACHMENT LAWS, though still within the state, when, with a fixed intent to leave it and his residence therein, he begins to remove to another state with intent to there reside. (p. 33.)

BETWEEN DOMICILE AND RESIDENCE THERE IS THIS DIFFERENCE—the one denotes a place of abode, whether temporary or permanent, and the other, a fixed permanent residence to which, when absent, one has the intention of returning. (p. 34.)

ATTACHMENT.—TO BE A NONRESIDENT WITHIN THE MEANING OF THE ATTACHMENT LAWS, it is not necessary that one have acquired a domicile in another state. (p. 34.)

EXECUTION—EXEMPTION.—ONE IS A NONRESIDENT WITHIN THE MEANING OF THE EXEMPTION LAWS, though still within the state, if he has begun to remove therefrom with a fixed intent to leave it, and to take up his residence in another state. A nonresident, within the meaning of the exemption laws, cannot be entitled to exemption on the ground that he is a resident. (p. 36.)

OFFICIAL BOND, SURETIES ON, WHEN SUBJECT TO PUNITIVE DAMAGES.—If a statute declares that a justice of the peace shall, with his sureties, be liable on his official bond for any misconduct of a person appointed by him as special constable, and that any official selling exempt property shall forfeit to the judgment debtor double its value, the sureties, as well as the justice himself, are liable for double the value of exempt property sold by such special constable. (p. 36.)

SURETIES—CONFLICT OF LAWS.—THE LAW AT THE TIME OF THE EXECUTION OF A CONTRACT OF SURETYSHIP is a part of it, and the sureties are bound accordingly, and so remain notwithstanding a subsequent change in such law. (p. 37.)

EXECUTION—EXEMPTION, RIGHT OF, AT WHAT TIME TO BE DETERMINED.—When a judgment debtor, though a nonresident when his property is seized by attachment, returns to, and bona fide resumes his residence within, the state before the sale, he becomes entitled to his exemption rights in such property. (p. 37.)

RES JUDICATA—PERSONAL SERVICE OF PROCESS.—The fact that the defendant was not a resident of the state cannot be established by a judgment against him in an attachment suit based on the ground of nonresidence, if he was not served with process and did not appear in that suit. (p. 38.)

Caldwell & Caldwell, for the plaintiffs in error.

Frank C. Cox, W. C. Meyer, and Frank W. Nesbit, for the defendant in error.

¹⁵⁵ BRANNON, J. F. A. Blum sued Louis Burt before a justice of Ohio county, and sued out an attachment, which was levied on Burt's goods and chattels. Burt claimed that the property levied upon was exempt under section 23, chapter 41 of the code, exempting, in favor of a husband or parent, personal property of two hundred dollars in value; but the constable sold the property, disregarding Burt's claim of exemption. The constable was one specially deputed by the justice in the case, not a regular bonded constable. Burt returned to the state before the sale. After the sale of the property Burt brought this action in the circuit court of Ohio county against James Allen, the justice, who issued the attachment, and the sureties in his official bond for damages for such sale, and the action resulted in a verdict in favor of Burt for double the value of the property attached and sold, and thereupon the defendants sued out this writ of error to the judgment rendered upon the verdict.

There are some very troublesome, nice questions in the case, about which different minds might readily differ. Burt, as the defendants claim, having had a domicile and residence in Ohio county, abandoned the same and with his wife and children left the state with the intention of remaining away, and thus became a nonresident, and not entitled to the exception. Burt, on the other hand, claims that he never became a nonresident, and did not leave the state with the fixed and settled intention of remaining away, but that his remaining away was dependent, in his mind, upon his success in procuring employment abroad. A question material in the case is whether he was a nonresident, in a legal point of view, when the attachment was sued out and levied. The case in this respect in this court turns on instructions given and refused. The defense contends that the very moment when a man, with fixed intent to leave this state, and his residence in it, and to reside in another state, begins his removal, he is a nonresident within the meaning of the attachment law. With this view of the law the defendants asked for, but were refused, the following instructions: "If the jury believe, ¹⁵⁶ from the evidence, that Louis Burt, the plaintiff, left the state with the intention of changing his residence

to Buffalo, New York, and that, while he was going out of this state pursuant to such intention, his property was attached and sold, as stated in the evidence, he was not entitled to claim, as against such levy, an exemption as a husband and parent residing in this state, and in such case the jury should find a verdict for the defendant. . . . If the jury believe, from the evidence, that the plaintiff, Louis Burt, left the state with the intention of removing his residence to any place outside of the same, he became a nonresident of the state as soon as he started on such removal and to make the same." The court gave for the plaintiff the following instruction bearing on the point now under consideration: "The court instructs the jury that a domicile once acquired is presumed to continue until a change in fact and in mind is shown. It is presumed to continue until another is acquired by actual residence with the intention of abandoning the former one, and the burden of proof lies on the party who asserts the change."

Under our attachment statute, giving an attachment on the ground that a party "is a nonresident of this state," does a person become a nonresident the very instant he starts upon his removal with fixed intention of abandoning his residence in this state and residing in another state? There must be two things to change a man from a resident to a nonresident—namely, intent and act. What he does must be *animo et acto*—that is, by act and with intent. Mere intent to remove will not alone do; there must be, in addition to intention, an act in the way of consummating that intention. The intention must be to change his residence from this state to residence out of this state. Mere going away temporarily, or without set purpose to abandon the former residence here, is not enough; it must be with fixed and definite design to give up residence here and assume one outside of the state. So much for the intention. Next as to the act of removal. What will be enough as an act to make the party subject to attachment? Must he have crossed the state line in the act of removal? Must he not only have crossed the state line, but assumed or taken up an actual residence beyond that line? Or is he a nonresident from the point of time when, with such intention of change of residence, he begins his journey, though he has not reached the state line?

¹⁵⁷ The authorities differ on this point, and the question in principle is close. Shinn on Attachments, section 96, says: "While one may, by the act of removal from the state of his

former home, with the intention of acquiring a home elsewhere, become a nonresident in the state of his former residence, yet it is the general rule that he does not become such a nonresident until he has acquired a new residence or place of abode with the intention of remaining in the state to which he has removed." Drake on Attachments, section 64, does not take a position. He puts the question, "When an individual departs from his place of abode in one state, with the intention of taking up his residence in another state, at what point of time is he to be regarded as a nonresident of the state? Can he be so considered before he passes the boundary of that state?" Drake does not definitely answer; but he says: "But a mere purpose to change residence, though evidenced by acts of the removal of the party's property, will not make him a nonresident of the state from which he purposes to depart, until he shall have begun, at least, the removal of his person." This indicates that Mr. Drake thinks that the party becomes nonresident the moment he begins the removal of his person.

Wade on Attachments, section 78, does not decide the point definitely as to whether the person must have passed the state line; but Mr. Wade takes the position that it is not necessary, in order to make one a nonresident of a state, that he shall have acquired a residence elsewhere. Waples on Attachments, section 46, evidently inclines to the view that the party is a nonresident the instant he begins his departure. He says: "As previously remarked in another connection, one immediately becomes a nonresident if he leaves his state with the design of becoming such, though the design has been held not to be decisive on this question until accompanied with the act of leaving, until he has passed beyond the state bounds. But if he has broken up his home, so that process can no longer be served there and be binding upon him, must his creditor be confined to personal service upon his debtor as the only means of reaching him? The case is not that of an absconding debtor; the plaintiff cannot truthfully set up the ground, in his affidavit, that the defendant is running away to avoid process, concealing himself, hiding his goods, etc., in fraud of creditors. The defendant avowedly means to abandon his residence, which he may lawfully do, and has broken up his home, and is openly traveling toward the state bounds to depart permanently. Why ¹⁵⁸ should not the extraordinary process be invocable on the ground of nonresidence?" I have come to the conclusion that Mr. Waples is right as an original question.

But it is not an original question with us. I believe that the case of *Clark v. Ward*, 12 Gratt. 440, can be defended on logical grounds, as an original proposition. It may be, perhaps, that the preponderance of authority is against it, but that is doubtful. Amid conflict, of course, we must follow that case, unless it be manifestly wrong and unworthy to be followed, dangerous and hurtful as a rule for the future, as I do not think it is. That case holds that "Ward, living in Virginia, determines to remove to another state, and, in pursuance of that purpose, leaves the place where he has resided, and proceeds directly to the place where he intends to reside. He is a nonresident of the state in the sense of the attachment law directly he commences his removal, and before he gets beyond the limits of the state." The opinion in the case is wholly unsatisfactory as containing no rationale.

In *Moore v. Holt*, 10 Gratt. 289, Judge Lee, whose opinion goes very far, expressed the opinion that under a statute giving attachment against persons "out of the country" that "it might be held, upon an equitable construction of this statute, that where a debtor has actually left his usual place of abode and set off for a distant state, with the intention not to return to his residence, but in future to reside out of the state, an attachment sued out after his departure might be sustained, although it chanced he had not actually passed the state line at the time the subpoena issued." Upon this subject, as an original question, I am led to the conclusion that the case of *Clark v. Ward*, 12 Gratt. 440, is right largely by the consideration that the reason and purpose of giving an attachment against a nonresident is the inability to serve process upon him for judgment in the ordinary course. A party leaves the place of his residence to go to another state. How can you serve process upon him? The creditor does not have to follow him on an express train or with a fleet horse to serve him with process before he gets to the state line. He has abandoned his usual place of abode, leaving no member of his family there upon whom process could be served. What is the creditor to do? Where is his remedy, unless he can resort to the property left within the state by the process of attachment? His debtor may sell it the next day. The object of the law is to give the creditor recourse at once by attachment to the property as his only security.

Waples on Attachments, section 48, says: "Only by his property ¹⁵⁹ can a nonresident debtor be reached and made to pay.

If he is temporarily present a summons may reach him, to be sure; but of what avail would that be if his property is not attached? He could readily return to his home and take his property with him, so that there would be nothing left within the jurisdiction upon which the judgment could be executed. The necessity, therefore, for the use of the writ of attachment, by which his property is held under a hypothetical lien till judgment, is obvious though the nonresident debtor be personally served with the summons. Ordinary process in such case would not prove effectual; hence the extraordinary is authorized."

Now, I say that the reason as given in the books for the attachment is, generally speaking, because by reason of the debtor's absence from his usual place of abode and his abandonment of it, service of process and ordinary procedure are prevented. Such being the reason for the allowance of an attachment against a nonresident, it applies as well the moment he commences his journey as after he crosses the state line. He is not at home to be served with process and for judgment. The creditor has no safety but to seize his property by attachment. It was error to refuse the two instructions above quoted asked by the defendants. It logically follows that it was error to give for the plaintiff the instruction above quoted, because it demanded that before Burt could become a nonresident, he must not only have crossed the state line, but must have acquired a residence in another state; indeed, he must have acquired a domicile there. Under *Clark v. Ward*, 12 Gratt. 440, he need not have acquired either domicile or residence in another state to be a nonresident of this state.

The said instruction given for the plaintiff speaks of a domicile, not residence. At least, it tells the jury that Burt's domicile in this state continued until he acquired another by actual residence, with the intent of abandoning his former domicile. This instruction may be interpreted to mean that he never would become a nonresident of this state until by such actual residence in another state as would constitute domicile there. He had acquired an actual domicile in that other state. This puts too severe a test of nonresidence in this state. It requires residence abroad amounting to actual domicile. A man may be a resident of one state without having actual domicile there, and if he is a resident only of another state, he is not a resident of this state, as all the books concede. But, under *Clark v. Ward*, 12 Gratt. 440, he need ¹⁶⁰ not have

even residence in another state, much less domicile, to be a nonresident of this state. There is a difference between domicile and residence. "Residence is used to indicate the place of abode, whether permanent or temporary; domicile denotes a fixed, permanent residence, to which, when absent, one has the intention of returning": 10 Am. & Eng. Ency. of Law, 2d ed., 8.

A man may have a residence in one place, a domicile in another. "Domicile is composed of two elements—residence and intention, and both of these must concur. Residence in a place without the requisite intention of remaining will not suffice to give one a domicile, nor will an intention to change one's domicile, unaccompanied by actual removal, result in a change of domicile": 10 Am. & Eng. Ency. of Law, 2d ed., 15.

Domicile means more than residence. It imports residence and fixed intention to remain there. A man may be a resident of a locality without having his domicile there. He can have only one domicile at the same time, though he may have more than one residence: Long v. Ryan, 30 Gratt. 718; White v. Tennant, 31 W. Va. 790, 13 Am. St. Rep. 896, 8 S. E. 596. I repeat that this instruction, in requiring such residence abroad, as amounts to a domicile abroad, to constitute a man a nonresident of this state makes too high a test of nonresidence in this state. The question of domicile is not necessarily involved in deciding whether a man is a nonresident, is not decisive of it. "In determining whether a debtor is a resident of a particular state, the question as to his domicile is not necessarily always involved, for he may have a residence which is not in law his domicile. Domicile includes residence, with an intention to remain; while no length of residence, without intention of remaining, constitutes domicile": Drake on Attachments, sec. 58.

It is not true that before one becomes a nonresident of one state, he must have actual residence in another. If the question were, whether a man who had a domicile in one state, had lost it, then whether he had such actual residence in another state as gives domicile there, the question of actuality of residence in the second state would be very material; but that would be upon the question of domicile, that is, loss of domicile in the first state; but we are on the question of loss of residence: Wade on Attachments, sec. 78.

A man's domicile is presumed to continue until another is taken up; but that is not the question here. Thus, I do

not see how we can sustain the instruction above quoted given for the plaintiff. Where a man abandons a domicile in one state and goes into another to reside, ¹⁶¹ the loss of domicile in the former state shows likely a loss of residence there also. So the assumption of a new domicile loses the former one, and may tend to show also the cessation of residence in the state of the former domicile, though not conclusively showing it. Domicile may throw light on the question of residence; but to be a nonresident of one state, or rather to change and become a nonresident of one state, it is not necessary that the person should so reside abroad as to have a domicile there. I have considered nonresidence under the attachment law, though this is an action for damages for selling property exempt under chapter 41, section 23 of the code; but I think when we have ascertained who is a nonresident under the attachment law, we have also ascertained who is a nonresident under said exemption statute. Nonresidence under both statutes means the same. A person who as a nonresident is liable to attachment is not entitled to claim the exemption because he is a nonresident.

Complaint is made that the court instructed the jury that, under certain circumstances, the jury should find for the plaintiff double the value of the goods sold from Burt. The code, chapter 50, section 31, says that "the justice . . . shall with his sureties be liable on his official bond for any neglect of duty, default or misconduct of such person [special constable] in the matter for which he was deputed." And in chapter 41, section 25, the code says: "And any officer who shall sell any property so claimed as exempt . . . shall forfeit to such debtor double the value of the property so sold, which forfeiture may be recovered from the officer and his sureties in his official bond."

It is contended that the latter statute is a penal statute, and that it must be strictly construed, as it involves the idea of penalty and punishment for the performance of an unlawful act, on principles stated in *Hall v. Norfolk etc. R. R. Co.*, 44 W. Va. 36, 67 Am. St. Rep. 757, 28 S. E. 754; and that, therefore, under strict construction, the statute cannot be made to apply to the justice in this case and his sureties, as sureties are looked upon with favor, and are bound only by the letter of their bond, and their liability is not to be extended by implication. It is contended that only the value of the property, not double its value, could be found. I do not think this con-

tention is sustainable. When the bond of the justice was executed, the law gave damages of double the value of property exempt by law for its sale, and made the official bond of an officer liable therefor. The sale of it contrary to law would be misconduct in ¹⁶² the officer, misuse of the power of his office; and the law also declared that if the justice selected, of his own choice, a person to act as special constable, to perform the same duties as a regular constable, he should be liable for the misconduct of such special constable.

It does not seem reasonable that one man, whose exempt property is sold, should be entitled to recover double its value, when sold by a regular constable, while another man for the like act should recover only half. Rather should we not say that taking these several statutes together uniformity was designed? They were all in force when this bond was given, and in *State v. Nutter*, 44 W. Va. 385, 30 S. E. 69, the doctrine is stated that while sureties stand on the letter of their contract, the law at the time of the contract is part of it, and if it gives to the contract a certain legal effect, that law is as much a part of the contract as if incorporated in it, and the sureties in the bond are bound according to such law. This double recovery is only damages; the statute has only doubled what was damages. They need not be sued for as a penalty, nor claimed as such in a declaration. The statute simply imposes that recovery as damages in the given case, the quantum of damages. I see no error in this feature of the instruction complained of.

Another feature of that instruction that is complained of is that which told the jury that if Burt was a husband and resident of this state on the day of the sale of the property, he might claim his exemption at any time before the sale. The contention of the plaintiff in error is, that to claim the exemption Burt must have been a resident of the state at the date of the levy. No authority is cited for this proposition. The authorities hold that the exemption in favor of a poor debtor may be claimed up to the beginning of the sale: *Waples on Homestead and Exemptions*, 777, 884. That, however, is not exactly the question in this case. Unquestionably a debtor, about whose residency there is no question, may claim his exemption at any time before sale; but in this case it is claimed that Burt held the status of nonresident on the date of the levy, and that right then vested in the creditor, and that even if Burt after that date returned to West Virginia and resumed his residence here bona fide, he could not claim this exemp-

tion. I do not so see it. That exemption statute must be liberally construed to accomplish its object, which is for the protection and benefit of a poor debtor and his helpless family, to give them the bread of life and a pillow whereon to lay the head, ¹⁶³ to save from destruction and absolute want. If the party be a resident of the state before his title to the property is absolutely gone by sale, the policy and purpose of the law demand that it shall be saved to him, as well as if he had never been out of the state. I concede that if the question were only whether the debtor was a resident of the state at the date of the levy, and he was not such resident then, that his after return would not abate the attachment or levy; but that is not the question. The question is whether he was a bona fide resident at the date of the sale. If he was, the statute of exemption comes to his relief.

It is claimed that the court erred in overruling a demurrer to the declaration. The reason given is that the declaration does not show on what ground the attachment issued, and should have shown that it was not issued on the ground of Burt's nonresidence; for that if it was issued on the ground of nonresidence, Burt was compelled, before suing for damages, to controvert the existence of that ground, and not doing so, the fact of nonresidence is established, and the declaration failing to negative that fact, all that it contains may be true, and yet the defendants not liable. If the defendant Burt in that action had been served with process or appeared, I do not say how far the fact of nonresidence would be established so as to bar an action for the sale of the property; but it does not appear that he was served with process or appeared in the action, and its record does not establish the fact of nonresidence conclusively against him. Moreover, if he was a nonresident up to the date of the judgment, but was a bona fide resident before actual sale, he would be entitled to claim the exemption. If he was a resident then, it was enough.

I think that the instruction that in ascertaining the intention of Burt in leaving the state to go to Buffalo, New York, the jury was entitled to consider all of the evidence from which any inference may be drawn cures any error that may exist from the refusal to give the instruction marked 7, page 91, printed record. I see no objection to that instruction; but the court committed no error in refusing it, for the reason that it is useless and improper to give different instructions announcing the same legal point merely differently worded.

The assignment of error as to the rejection of the evidence of Richard Boecker is not tenable, because relating merely to an imperfect local custom; and, moreover, the answer expected is not given.

¹⁶⁴ The assignment of error as to evidence of F. A. Blum is not well taken, because expressive of the witness' mere opinion.

The exclusion of the evidence of William E. Blum, which is assigned as error, is not error, because it was proposed to give merely Blum's construction or inference from the language of Burt.

For these reasons we find no error, except as to the three instructions, above quoted, but because of error as to them we reverse the judgment, set aside the verdict, and grant the defendants a new trial.

The Terms "Residence" and "Domicile" are not synonymous. A person domiciled abroad may be a resident, while a person domiciled in the state may be a nonresident: Notes to Frost v. Brisbin, 32 Am. Dec. 427; Berry v. Wilcox, 48 Am. St. Rep. 712. That is properly the domicile of a person where he has his true, fixed, permanent home, and to which, whenever he is absent, he has the intention of returning: Note to Ringgold v. Barley, 59 Am. Dec. 111. Residence, within the meaning of attachment laws, implies an established abode, fixed permanently for a time for business or other purposes, although there may be an intent existing all of the time to return in the future to the original domicile: See the monographic note to Berry v. Wilcox, 48 Am. St. Rep. 712.

To Effect a Change of Residence or Domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place, with the intention of residing there: See the monographic note to Berry v. Wilcox, 48 Am. St. Rep. 713.

FISHER v. HARTLEY.

[48 W. Va. 339, 37 S. E. 578.]

A JUDGMENT MERGES THE CAUSE OF ACTION on which it is based, irrespective of the character of such action, and it cannot again be made the subject of a suit. (p. 40.)

THE STATUTE OF LIMITATIONS IN AN ACTION ON A JUDGMENT is not prevented from operating by the fact that the defendant, having departed from the state after the accrual of the original cause of action, could not successfully plead the statute of limitations against the suit thereon. That cause merged in the judgment, and cannot be regarded as being the subject matter of a suit on such judgment. (p. 41.)

STATUTE OF LIMITATIONS.—IF ONE REMOVES FROM THE STATE both before the birth of the cause of action and be-

fore the right to sue thereon accrues, his absence from the state does not prevent the running of the statute of limitations. (p. 41.)

STATUTE OF LIMITATIONS—OBSTRUCTION TO PROSECUTION OF ACTION, WHAT IS WITHIN THE MEANING OF.—The departure from, and residence out of, the state after the accruing of a cause of action are of themselves obstructions to the prosecution of the right of action. (p. 42.)

Charles E. Hogg, for the plaintiffs in error.

John H. Riley, for the defendant in error.

³³⁹ BRANNON, J. On the 12th of August, 1891, Fisher, then in life, recovered a personal judgment against Hartley, and on the fourth day of May, 1894, Hogg and Campbell, executors of Fisher, brought an action of debt in the circuit court of Jackson county upon ³⁴⁰ said judgment against Hartley, and he pleaded the statute of limitations, and to that plea the plaintiffs filed a replication setting up "that before the right of action in the premises in the declaration alleged accrued to the plaintiffs, the said defendant resided in this state, and resided therein when the liability was contracted upon which the judgment sued on in this action is founded, and that on the — day of —, 1880, the said defendant departed and removed out of said state, and that the defendant continued to remain and reside out of this state until the — day of —, 1894; and the plaintiffs further say that the defendant returned into this state on the — day of —, 1894, and that the plaintiffs commenced this action on the fourth day of May, 1894, and so deducting the time the said defendant remained out of this state as aforesaid, the said several causes of action in the declaration mentioned did accrue to the said plaintiffs within ten years next before the commencement of this suit." The court afterward struck this replication out of the case as presenting no answer to the plea of the statute of limitations, and judgment having been rendered by the court upon facts agreed in favor of the defendant, Fisher's executors have brought the case to this court.

The case turns entirely upon the question whether the court was right in striking out said special replication. It will be observed that that replication does not state that on the twelfth day of August, 1881, Hartley resided in this state, but, on the contrary, states and admits that he removed out of the state in 1880. This suit is based alone on the judgment, and on it the statute of limitations commenced to run the instant it was rendered. Before that judgment was rendered Hartley

had ceased to reside in this state. That replication says that Hartley resided in the state when the liability was contracted upon which the judgment was founded, and thus seeks to introduce as a material element in the case that fact; but it is wholly immaterial. No matter what the cause of action on which that judgment rested, as the law is well settled that whatever that cause of action was, it is merged, closed and drowned in that personal judgment; for when a personal judgment is rendered upon any cause of action, that cause cannot be again made the subject of a suit, and the judgment is thereafter the sole test of the rights of the parties, constitutes a new debt of the highest dignity, ³⁴¹ closing the statute of limitation on the original cause of action. Such is the general law: 15 Am. & Eng. Ency. of Law, 336; Freeman on Judgments, secs. 215-217. By the judgment the debt is "changed into a matter of record and merged in the judgment, and the plaintiff's remedy is upon the latter security while it remains in force. . . . The original claim has, by being sued upon and merged in the judgment, lost its vitality and expended its force and effect": Black on Judgments, sec. 674.

It is plain, therefore, that the residence in the state of Hartley at the time of the accrual of the original cause of action on which the judgment is based cannot save the plaintiffs from the statute of limitations. To escape the statute of limitations Hartley must have resided in the state on the date of the judgment, for then this new debt and its right of action arose and accrued; and on that date he was not a resident. That such is the true view—that is, that the date of the judgment is the crucial point as to residence—is further fortified by the consideration that chapter 104 of the code gives limitations on notes and other causes of personal action, while chapter 139 prescribes limitation to a judgment, showing that when there is a judgment that limitation applies, not the limitation applicable to the original cause of action. Hartley being a nonresident at the time of the birth of the demand and the accrual of the right of action, the exception from the statute of limitations that where the cause of action shall accrue against a person who had before resided in this state, "if such person shall by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right . . . the time that such obstruction may have continued shall not be computed," cannot save the plaintiffs' demand from the statute of

limitations. *Walsh v. Schilling*, 33 W. Va. 108, 10 S. E. 54, holds that where the defendant, though once a resident of the state, removes out of the state before the accrual or birth of the cause of action, such removal does not bring him within the exception specified in the statute just quoted. So, also, holds *Embrey v. Jamison*, 131 U. S. 336, 9 Sup. Ct. Rep. 776, construing the Virginia statute precisely the same as ours. So, in effect, *Hefflebower v. Detrick*, 27 W. Va. 16. Hartley had removed from the state before the birth of the present cause of action and before right of action thereon, both being in this case the same instant. The origin and accrual of the cause of action being ³⁴² simultaneous, we need not discuss the conflict of opinion between the cases of *Embrey v. Jamison*, 131 U. S. 336, 9 Sup. Ct. Rep. 776, which holds that to bring a party within the exception of the statute, he must be a resident of the state at the accrual or maturity of the right of action, and that if a resident at the birth of the cause of action, but not at the accrual or maturity of right of action, he does not come within the exception, and *Hefflebower v. Detrick*, 27 W. Va. 16, which holds that if a party is a resident at the birth, but removes before the accrual, of the cause of action, he does come within the exception. I think the replication was properly stricken out as presenting no answer to the plea of the statute.

It is objected that the replication is bad also because it does not affirmatively allege that the removal of Hartley from the state did in fact obstruct the prosecution of the plaintiff's action. I think this is no objection to the replication, because as held in *Cheatham v. Aistrop*, 97 Va. 457, 34 S. E. 57, and *Ficklin v. Carrington*, 31 Gratt. 219, the "removal of a judgment debtor from the state is of itself an obstruction to a suit to enforce the judgment, and the statute of limitations does not run against the judgment while the debtor remains out of the state."

The statute itself seems to confirm this construction in the fact that it mentions departure from the state, absconding, and concealing as specific grounds of obstruction of the right of action excusing from the operation of the statute, and then adds "or by any other ways or means obstruct the prosecution of such right," thus plainly intending to say that such departure, absconding, or concealing himself shall per se be regarded as obstruction of the prosecution of action excusing

from the bar of the statute. Therefore, we affirm the judgment of the circuit court.

A Judgment Merges the Cause of Action upon which it is based. The old obligation ceases to exist and the judgment takes its place: *Tourville v. Wabash R. R. Co.*, 148 Mo. 614, 71 Am. St. Rep. 650, 50 S. W. 300; *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663. But see *Lambert v. Nicklass*, 45 W. Va. 527, 72 Am. St. Rep. 828, 31 S. E. 951.

Limitation of Actions.—Absence from the state interrupts the running of the statute of limitations: *Wilson v. Dagget*, 88 Tex. 375, 53 Am. St. Rep. 766, 31 S. W. 618; *Blackburn v. Blackburn*, 124 Mich. 190, 83 Am. St. Rep. 325, 82 N. W. 835. This principle applies to an action on a judgment: *Latimer v. Trowbridge*, 52 S. C. 193, 68 Am. St. Rep. 893, 29 S. E. 634. And it has been held that the statute does not run in favor of a defendant while he is absent from the state, though he was so absent when the cause of action accrued: *Stanley v. Stanley*, 47 Ohio St. 225, 21 Am. St. Rep. 806, 24 N. E. 493. But a statute of limitations providing that the temporary absence of a defendant from the state shall not be taken as a part of the time limited does not apply to persons who were nonresidents at the time the action accrued: *Huff v. Crawford*, 88 Tex. 368, 53 Am. St. Rep. 763, 30 S. W. 546, 31 S. W. 614; *Van Stantvoord v. Roethler*, 85 Or. 250, 76 Am. St. Rep. 472, 57 Pac. 628. Compare *Mason v. Union Mills etc. Co.*, 81 Md. 446, 48 Am. St. Rep. 524, 32 Atl. 311.

SOUTH PENN OIL COMPANY v. EDGELL.

[48 W. Va. 348, 37 S. E. 596.]

EQUITY HAS JURISDICTION OF A SUIT to be relieved from the forfeiture of a lease. (p. 45.)

FORFEITURE, RELIEF OF TENANT FROM.—A court of equity will often relieve a tenant from a forfeiture where his breach of the lease was not willful, and particularly when it was the result of accident or mistake. (p. 45.)

FORFEITURE.—THAT A MISTAKE WAS NEGLIGENT does not deprive a tenant of the right to be relieved in equity from a forfeiture of his lease on account of a breach thereof due to such mistake. (p. 45.)

FORFEITURE, RELIEF FROM.—WHERE A PENALTY OR FORFEITURE IS DESIGNED MERELY AS SECURITY TO ENFORCE THE PRINCIPAL OBLIGATION, equity will relieve against it. (p. 47.)

FORFEITURE FOR BREACH OF LEASE, RELIEF FROM. If a gas and oil lease provides that the lessor may connect his service pipe with the gas line, and thereby supply a dwelling with gas during the continuance of the lease, and contains a clause providing for a forfeiture on a breach of any of its conditions or covenants, and the pipe is disconnected and the right to maintain it denied by the officers of the lessee, because of their neglect in not informing themselves of the contents of the lease, equity may, nevertheless, relieve from the forfeiture. (p. 47.)

McCluer & McCluer, V. B. Archer, and William Beard, for the appellants.

U. N. Arnett and A. B. Fleming, for the appellees.

349 DENT, J. Mary A. Edgell and others appeal from a decree of the circuit court of Pleasants county overruling a motion to dissolve and continuing an injunction against them in favor of the South Penn Oil Company and the Victor Oil and Gas Company.

The appellees held a lease of all the oil and gas under a certain tract of land belonging to the appellants. In addition to a cash consideration of five hundred dollars paid, the appellees were to pay three hundred dollars per year in semi-annual payments for the use of the gas from the well already drilled by them, also one-eighth of the oil produced; and the following stipulations were made a part of such lease under a compromise agreement, to wit: "And it is further agreed, as a part of the consideration of this agreement and compromise, that the said Mary A. Edgell, her heirs or assigns, shall have the right to connect a service line with the gas line of the first parties, near said gas well, and at her own cost and expense lay a service line from said well connecting to the dwelling-house occupied by her on said land, and have the use of the gas from said well for domestic purposes in such dwelling-house free of charge so long as the first parties, or those holding under them, use or utilize the gas from said well. Such connections and service line and all fixtures shall be made, placed, and kept in repair at the expense of said Mary A. Edgell at her risk; it being understood by the second parties that the pressure of gas from said gas well is uneven and variable, and that the use thereof is dangerous, and that the first parties are not to be liable in anywise and on any account to the second parties, or to the said Mary A. Edgell, or those holding under her, for any injury she or they may receive or any damage which she or they may sustain by reason of her so connecting her said service line with the gas line or said well, the said parties, or Mary A. Edgell, taking all risks; and if from any cause the gas from the said gas well be not used or utilized, then said second parties are to have gas for domestic use free of cost as aforesaid, until said well is abandoned, and should said well be abandoned and there be other well or other wells

hereafter drilled by said first parties or their assigns, then said second parties are to have gas from said well or wells as aforesaid; and if the said first parties fail or refuse to pay, keep, and perform any of covenants or obligations that they have ³⁵⁰ agreed to or undertaken in the original lease or in the compromise, then and in that event the lease and this compromise contract is at an end as fully and completely as if the lease and compromise had never been made and entered into."

The officers and agents of the appellees, having lost sight of this part of their lease which was contained in a compromise agreement, sought to compel Mrs. Edgell to sign a new contract of release of risk of damage, and to pay for the gas used by her. She refusing to do so, they disconnected her service pipe so as to deprive her of the use of the gas, partly, as they claim, because she was wasting and misusing the gas, but principally, as the evidence shows, because they were not aware of the foregoing stipulation as belonging to their lease. This was a matter of plain negligence on the part of some of the officers or counselors of the appellees, for they had possession of a copy of the contract, and by proper diligence could have been fully informed of its contents. She made application to be allowed to reconnect the pipe and use the gas. This appellees refused. Thereupon Mrs. Edgell, as a matter of retaliation, declared a forfeiture of the whole contract, and seized possession of the property, including the gas and oil well, and all the appellees' machinery and fixtures in connection therewith. Appellees then filed their bill for an enforcement of their lease and for relief from the forfeiture thereof, if the same were legal.

Under the prayer for general relief in a case of this character relief from forfeiture could be granted. There is no question that equity has jurisdiction of the matters in controversy, as alleged in the bill: 22 Am. & Eng. Ency. of Law, 972; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271; Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923. "A court of equity will often relieve a tenant from an attempted inequitable forfeiture unless the tenant's breach was willful, and particularly when the breach or default was a result of accident or mistake": 12 Am. & Eng. Ency. of Law, 758q. The breach in this case came from a negligent mistake, but it was not willful in a legal sense. To be so it must be knowingly committed. The appellees having discovered the gas and oil

under appellant's property had a vested estate therein. Out of this estate, and as a part consideration therefor, they had granted to Mrs. Edgell gas for domestic use. While they fully complied with all the other conditions of their lease and paid the rentals therefor, this grant they overlooked and temporarily deprived her of the benefits ³⁵¹ thereof until they found out their mistake. This is not a plain, open, knowing, and willful violation of the contract, but it is merely a denial of part of the consideration thereof through oversight or mistake.

"In general, the exercise of a restraining power of a court of equity against forfeitures depends upon the peculiar circumstances of the particular case; whether the forfeiture will work a hardship at the time not contemplated when the contract was made or other general grounds of equitable relief": 12 Am. & Eng. Ency. of Law, 758p. In the case of *Ganer v. Hannah*, 6 Duer, 273, Judge Slosson says: "I take the rule to be well settled that equity will readily, where the breach is not willful, relieve from forfeiture or penalty, as where the stipulation is intended as a mere security for the payment of money and precise compensation can be made."

In the case of *Davis v. West*, 12 Ves. 475, the chancellor says: "That where covenants are broken and there is no fraud, and the party is capable of giving complete compensation, it is the province of a court of equity to interfere to give the relief against forfeiture for breach of other covenants as well as that for payment of rent." In Story's Equity Jurisprudence, section 1314, it is said: "The general principle now adopted is

that wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the nonperformance. In every such case the true test (generally if not universally) by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then if the penalty is to secure the mere payment of money, courts of equity will relieve the party upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill and will direct an issue of quantum damnificatus, and when the amount of damages is ascertained by a

jury upon the trial of such an issue, they will grant relief on payment of such damages." The forfeiture clause was inserted in the compromise lease under discussion so far as the rent is concerned, as a penalty to secure the payment of the rent partly in ³⁵² money and partly in gas and oil. "In reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act) that if he omits to do the act he shall suffer an enormous loss wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side. . . . Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal object. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh or vindictive injury": Story's Equity Jurisprudence, 1316. "Where the condition or forfeiture is merely a security for the nonpayment of money (such as a right of re-entry upon or nonpayment of rent) there it is to be treated as a mere security and in the nature of a penalty, and is accordingly relievable": Story's Equity Jurisprudence, 1321.

The gas to be furnished and denied in this case was strictly rent, being a part of the consideration for the compromise lease, the value of which could be easily ascertained in money. All the agents of the appellees, acting under a mistake as to Mrs. Edgell's rights, asked of her was to sign a contract agreeing to pay two dollars per month for each gas fire in her house during the winter, and one dollar and fifty cents per month during the summer. The gas was only shut off for about one week, so that the pecuniary value thereof was very small. The appellants claim on account of the cold weather they suffered large consequential damages. The matter of damages has not yet been considered by the circuit court, and is not before this court: *State v. Reyman*, 48 W. Va. 307, 37 S. E. 591. The question of mistake has little to do with this case except as furnishing an excuse for the conduct of appellees' agents, and to show that they thought they were justified therein, and

did not act fraudulently or knowingly. Being a matter of negligence on their part, it could not furnish a legal excuse for their ³⁵³ conduct. This case is determined on the fact that the gas was a rental consideration easily ascertainable in money, and that so far as it was concerned, the forfeiture was in the nature of a penalty to secure the gas right to the appellants against which a court of equity will grant relief on the payment of the damages, to be properly ascertained for the breach of the condition of their contract on the part of the appellees and their agents.

The decree is affirmed.

OF RELIEF IN EQUITY FROM FORFEITURES.*

I. General Principles.

- a. Basis of Equity Jurisdiction.
- b. Accident, Mistake, Fraud, etc.
- c. Willfulness and Negligence.
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II. Forfeitures in Particular Cases.

- a. Leases.
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- h. Statutory Forfeitures.
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I. General Principles.

a. **Basis of Equity Jurisdiction.**—To relieve against penalties and forfeitures is one of the ordinary grounds of equity jurisdiction. Forfeitures are usually considered to be securities for the payment of money and the performance of conditions, and where compensation can be made for nonperformance, a court of equity will relieve against the rigid enforcement of the contract. This is upon the principle that a court of equity is a court of conscience, and will permit nothing to be done within its jurisdiction which is unconscionable, and that a party having a legal right shall not be

*REFERENCES TO MONOGRAPHIC NOTES.

Relief in equity against forfeitures: 68 Am. Dec. 85-88.

Forfeiture of leases: 26 Am. St. Rep. 910-918.

Waiver of forfeiture of leases: 47 Am. St. Rep. 197-199.

permitted to avail himself of it for the purposes of injustice and oppression. But it is not, therefore, to be supposed that a court of chancery will dispense lightly with contracts, and substitute other agreements more in accordance with right and conscience. Every presumption will be indulged in favor of contracts, and they will be enforced according to the intention of the parties, unless it can be shown that thereby some hardship or wrong will result, which was not within the presumed contemplation of the parties: *Nevada County v. Hicks*, 38 Ark. 557; *Sandford v. Flint*, 24 Mich. 26; *Grigg v. Landis*, 21 N. J. Eq. 494; *Noyes v. Anderson*, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316.

It is a familiar principle that forfeitures are not favored in equity, and receive a strict construction against those for whose benefit they are introduced: *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Fidelity etc. Trust Co. v. Fridenberg*, 175 Pa. St. 500, 52 Am. St. Rep. 851, 34 Atl. 848. Equity abhors forfeitures, and will not enforce them, but will leave the parties as they are: *Lincoln v. Quynn*, 68 Md. 299, 6 Am. St. Rep. 446, 11 Atl. 848; *Krutz v. Robbins*, 12 Wash. 7, 50 Am. St. Rep. 871, 40 Pac. 415; *Cheney v. Bilby*, 74 Fed. 52. And this, although no equitable relief would be given the defaulting party: *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157. The doctrine of equity is not forfeiture, but justice and compensation: *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53; *Gordon v. Lowell*, 21 Me. 251.

b. *Accident, Mistake, Fraud, etc.*—Accident, surprise, mistake, ignorance, and fraud, may be invoked to obtain equitable relief against forfeitures where, under ordinary circumstances, a court of equity would have no jurisdiction to interfere: *Mactier v. Osborn*, 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641; *Hulett v. Fairbanks*, 40 Ohic St. 233; *Duke of Beaufort v. Neeld*, 12 Clark & F. 248; *Eaton v. Lyon*, 3 Ves. 690; *Hill v. Barclay*, 18 Ves. 56, 62.

To illustrate, a mortgagor had taken means to obtain money for redeeming the premises from foreclosure, which rendered it reasonably certain that he would succeed. But by reason of the failure of the party promising the money to meet him at the appointed hour, he was delayed until after banking hours, and was thereby prevented from sending the money to the clerk of the court within the time limited by the decree. It was held that, on the ground of accident, the mortgagor was entitled to redeem: *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742, 9 Atl. 4.

So, a lessee, having a vested interest in valuable improvements made under a lease giving him a right of renewal on giving notice, is entitled to equitable relief from his failure to give the notice in season because of mistake or accident: *New York Life Ins. Co. v. Rector*, 12 Abb. N. C. 50.

In *Wing v. Harvey*, 5 De Gex, M. & G. 265, a life insurance policy was conditioned to be void if the insured went out of Europe without a license. The insured assigned his policy and went to Canada, without receiving license. When the assignee paid the premium to the insurance agent, he advised him that the assured had taken up his residence in Canada. The agent replied that the policy was not avoided, and he received the premiums without objection until the death of the insured. It was held that a forfeiture could not be insisted upon by the insurance company, since the assignee had been misled by the agent, and to enforce the forfeiture would be a surprise, if not an actual fraud.

c. **Willfulness and Negligence.**—The expression is not infrequently met with that equity will not aid a party in default by relieving him against a forfeiture, if he was negligent or careless in incurring the forfeiture, or if his breach of the contract was willful—willful, as thus used, being synonymous with voluntary: See *Parsons v. Smilie*, 97 Cal. 647, 654, 32 Pac. 703; *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593; *Elliott v. Turner*, 13 Sim. 477, 485. Undoubtedly, gross negligence, or an intention not to perform only in case it suits a party's interest, will preclude him from obtaining equitable relief: See *Hancock v. Carlton*, 6 Gray, 39; *Eastman v. Plumer*, 46 N. H. 464, 479; *Voorhis v. Murphy*, 26 N. J. Eq. 434. Nevertheless, the mere fact that a party is negligent or willful in not performing a contract in accordance with its conditions, will not, it is believed, close the doors of a court of equity to him in the absence of bad faith, fraud, or other controlling circumstances: *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53, 57; *Mactier v. Osborn*, 146 Mass. 399, 4 Am. St. Rep. 323, 326, 15 N. E. 641; *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742, 9 Atl. 4; *South Penn Oil Co. v. Edgell*, the principal case, ante, p. 43.

d. **Time of Performance.**—A court of equity will often relieve a party who has not performed his contract strictly, as to time, unless it appears that the intention was that it should cease if not performed in time: *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53; *Noyes v. Anderson*, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316; *Wilson v. Lewis*, 2 Yeates, 466. In equity time is not considered to be of the essence of a contract, unless the parties expressly agree that it shall be so regarded, or unless it follows from the nature and purposes of the contract: *Tate v. Pensacola etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 South. 542; *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593.

Slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of a time stipulation: *National Land Co. v. Perry*, 23 Kan. 140. And whenever one has done acts inconsistent with the supposition that he intends to hold his opponent strictly to his part of an agreement in which time is made of the

essence, he is to be taken to have waived the stipulation: *Grigg v. Landis*, 21 N. J. Eq. 494, 508.

The doctrine has been laid down that where time is expressly made the essence of a contract, the party in default is precluded from seeking relief in equity: *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484; *Wells v. Smith*, 2 Edw. Ch. 78. In the first of these cases there was gross neglect and a clear abandonment of the contract by the party in default. There was a sale, with his consent, of the subject matter of the contract. Commenting on the second of the above cases, Vice-Chancellor Gridley, in *Edgerton v. Peckham*, 11 Paige, 352, 355, said: "I cannot forbear remarking on this case, however, highly as I respect the opinion of the vice-chancellor of the first circuit, that I consider it as adopting an exceedingly severe rule, and a case which, upon the facts disclosed, entitled the complainant to relief."

The above cases all involved the conveyance of land. In another such case, *Wells v. Smith*, 7 Paige, 22, 31 Am. Dec. 274, the parties had made payment at the day an essential part of the contract. The vendee, without special excuse, had failed to make payment at the specified time, and he was denied specific performance. But he had only paid for the use of the property, so that there was, in fact, no forfeiture except the loss of a profitable speculation, which he failed to obtain the benefit of by nonperformance of a condition precedent to the vesting of title in him. But, in the course of the opinion, Chancellor Walworth said: "If a vendor, after he had received the greater portion of the purchase money, should attempt to enforce a forfeiture of the money paid, under a stipulation that he might keep the whole amount thus received and the premises also if the last payment was not made at the day, I am not prepared to say that this court would not interfere to compel him either to accept the last payment and convey the premises, or to restore the purchase money already paid, after deducting a reasonable allowance for the use of the premises in the meantime."

Chancellor Walworth's dictum would apply as well where the result of the forfeiture would be to confiscate valuable improvements made on the premises, instead of the purchase money. And this view was taken in *Grigg v. Landis*, 21 N. J. Eq. 494, though in that case the default as to time was not insisted upon by the vendor, but the parties had proceeded after the breach.

The true doctrine underlying relief from forfeitures under contracts for the sale of land where time is made of the essence, we believe, is this: If the contract is executory at the time of the default, and the purchase price or no considerable part of it has been paid, and valuable improvements have not been made on the premises, then the defaulting vendee has no claim to equitable relief. Performance on his part is a condition precedent to performance on the part of the vendor. But if the purchase of the

property has been accompanied with a long enjoyment, and the expenditure of money on the premises, or the payment of a considerable portion of the purchase price, then a default in the time of performance by the vendee will not be permitted to work a forfeiture against him in equity, unless there has been such a delay as to show an abandonment, or to affect the circumstances of the parties, or the property involved: *Edgerton v. Peckham*, 11 Paige, 352. See, in this connection, "Deeds and Conveyances," *infra*.

Time may be of the essence of a contract by reason of the peculiar nature of the subject matter. Contracts of life insurance, and of subscriptions to shares of stock involving the payment of assessments thereon, fall in this category. Clearly, it is essential to the successful prosecution of corporate undertakings that assessments and calls should be paid promptly. And where, according to the terms of the subscription, the stock may be declared forfeited for nonpayment of assessments, a forfeiture duly and regularly incurred will not be relieved against: *Weeks v. Silver Inlet etc. Co.*, 8 N. Y. St. 110. See, also, "Corporate Stock," *infra*.

So, promptness in the payment of premiums is essential to the business of life insurance. Calculations of insurance companies are based on the hypothesis of prompt payments. Forfeiture for nonpayment is a necessary means of protection from embarrassment. If a life insurance policy is conditioned to be void for the failure to meet premiums when due, equity cannot relieve against a forfeiture occasioned by the neglect of the insured to perform this condition: *Klein v. Insurance Co.*, 104 U. S. 88. See, also, "Insurance Policies," *infra*.

e. **Conditions Precedent and Subsequent.**—Courts of equity have jurisdiction to relieve from the consequences of the breach of a condition subsequent upon the principle of compensation, where compensation can be made and the party in default is willing and able to make it: *Walker v. Wheeler*, 2 Conn. 299; *Donnelly v. Easter*, 94 Wis. 390, 69 N. W. 157. "A court of equity will never lend its aid to destroy an estate for the breach of a condition subsequent, but will relieve against the consequences wherever the case admits of a certain compensation in damages, as where the condition is to pay money. It regards conditions as mere remedies to enforce the fulfillment of obligations and will not allow them to be perverted from their purpose either on one side or the other": *Worthen v. Ratcliffe*, 42 Ark. 330, 349.

But, notwithstanding equity will, in a proper case, relieve against the nonperformance of a condition subsequent, and thereby prevent the divesting of a right or of an estate, it will not, ordinarily, relieve against the nonperformance of a condition precedent to the vesting of a right or of an estate, and thereby give a right or an estate that never vested: *Bucks v. Jouitt*, 8 Litt. 229; *City Bank v.*

Smith, 3 Gill & J. 265, 281; Wells v. Smith, 7 Paige, 22, 31 Am. Dec. 274; People's Bank v. Mitchell, 73 N. Y. 406; Barnet v. Passumpsic Turnpike Co., 15 Vt. 757.

Nevertheless, the mere fact that the forfeiture arises from a breach of a condition precedent does not seem to be an insuperable obstacle to equitable relief. At least, there are dicta to the effect that where compensation can be made for the nonperformance or breach, and where no injury has been sustained, relief may be given: See *De Forest v. Bates*, 1 Edw. Ch. 394, 397; *Noyes v. Anderson*, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316. In *Thompson v. Whipple*, 5 R. I. 144, 148, it is said that "the circumstances which govern the interference of the court are not, whether the condition be subsequent or precedent, but whether a just compensation can or cannot be made."

f. **Compensation.**—The doctrine of equity is not forfeiture, but compensation: *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53. Whenever a forfeiture is taken advantage of that works hardship, and full compensation can be made by the person against whom it is sought to the one who has taken advantage of it, courts of equity generally relieve against it, upon the making of such compensation: *Worthen v. Ratcliffe*, 42 Ark. 330; *Blair v. Chamblin*, 39 Ill. 521, 89 Am. Dec. 322; *Garner v. Hannah*, 6 Duer. 262, 273; *Hager v. Buck*, 44 Vt. 285, 8 Am. Rep. 368; *Hackett v. Alcock*, 1 Call, 553. "Where the agreement is simply one for the payment of money, and the forfeiture of either land, chattels, or money is incurred by nonperformance, the forfeiture will be relieved against, unless the defaulting party by his inequitable conduct, has deprived himself of such relief, or the special circumstances show that the relief should not be given": *Sunday Lake Min. Co. v. Wakefield*, 72 Wis. 204, 39 N. W. 136.

In truth, the most vital question in determining whether a court of equity will grant relief against a forfeiture seems to be the ability and willingness of the party in default subsequently to perform the condition, or make compensation for his failure of performance. It is not meant to intimate by this that equity will give relief in all cases susceptible of compensation, but that the fact that the party seeking to benefit by a forfeiture can be placed in statu quo or fully compensated is a very material, probably the most material, circumstance in determining whether equitable relief will be extended: *Worthen v. Ratcliffe*, 42 Ark. 330; *Thompson v. Whipple*, 5 R. I. 144, 148; *Clark v. Barnard*, 108 U. S. 436, 455, 2 Sup. Ct. Rep. 878."

"The true foundation of equitable relief, in cases of penalties and forfeitures, is limited to such cases as admit of compensation according to the original intent of the parties": *Atkins v. Chilson*, 11 Met. 112, 117. Unless full compensation can be given, so as to

put the other party in the situation he would have occupied but for the default, a court of equity will not interfere: *Parsons v. Smilie*, 97 Cal. 647, 653, 32 Pac. 702.

And where a party seeks the aid of equity for relief in a case in which the forfeiture grows out of the nonpayment of money, he must show that he has since tendered payment, with interest. If the tender was not accepted, he must aver in his petition that he is now ready and willing to pay: *Beecher v. Beecher*, 43 Conn. 556, 562.

g. *Waiver*.—When there has been a breach of a contract occasioning a forfeiture, but the party entitled to take advantage thereof acquiesces in it, either expressly or by conduct, the waiver of the forfeiture will many times be recognized at law, and the party be precluded from enforcing it. Yet if it is necessary for the party in default to appeal to a court of equity, he may there find relief: *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378; *Grigg v. Landis*, 21 N. J. Eq. 494; *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151.

II. Forfeitures in Particular Cases.

a. *Leases*.—The jurisdiction of equity to relieve from forfeitures seems to have been invoked most frequently in favor of defaulting lessees. If a lease provides that on the failure of the lessee to pay the rent at the specified time the lease shall be void, or the lessor may re-enter and declare the lease at an end, equity will intervene to relieve the lessee, and set aside the forfeiture. And this will be done whether the lessee has been dispossessed by the lessor or not. This doctrine is based on the principle that in all cases where the penalty or forfeiture is designed to secure the payment of a certain sum of money, a court of equity will grant relief on the payment of the money secured with interest. And such covenants in leases are intended merely as security for the payment of money, and the money being paid the purpose of the forfeiture is gone: *Palmer v. Ford*, 70 Ill. 369; *Bacon v. Western Furniture Co.*, 1 Wils. (Ind.) 567; *Atkins v. Chilson*, 11 Met. 112; *Horton v. New York etc. R. R. Co.*, 12 Abb. N. C. 30, 42; *Stamps v. Cooley*, 91 N. C. 316; *Sunday Lake Min. Co. v. Wakefield*, 72 Wils. 204, 39 N. W. 136; *Bowser v. Colby*, 1 Hare, 109; *Eaton v. Lyon*, 3 Ves. 692; *Hill v. Barclay*, 16 Ves. 403; *Reynolds v. Pitt*, 19 Ves. 140; *Bracebridge v. Buckley*, 2 Price, 200; *Horne v. Thompson*, 1 Sausse & S. 615.

When, however, the forfeiture arises from the breach of covenants to perform some collateral duty, and not intended merely to secure the payment of rent, equity will not ordinarily extend relief, because exact compensation cannot be made for the default. Thus it has been held that no relief will be given where there is a breach of a covenant to insure: *Reynolds v. Pitt*, 19 Ves. 134; *Gregory v. Wilson*, 9 Hare, 683; *Green v. Bridges*, 4 Sim. 96; *White v.*

Warner, 2 Mer. 459; of a covenant to make repairs: Hill v. Barclay, 18 Ves. 56; Croft v. Goldsmid, 24 Beav. 312; Gregory v. Wilson, 9 Hare, 683; Nokes v. Gibbon, 3 Drew. 681; Bracebridge v. Buckley, 2 Price, 202, 215; of a covenant not to assign or alien a term: Baxter v. Lansing, 7 Paige, 350; Wafer v. Mocato, 9 Mod. 112; Hill v. Barclay, 18 Ves. 56; of a covenant not to allow third persons to use a way across the premises: Descarlett v. Dennett, 9 Mod. 22; of a covenant to cultivate the land in a husband-like manner: Hills v. Rowland, 4 De Gex, M. & G. 430; of a covenant not to carry on a particular trade: Macher v. Foundling Hospital, 1 Ves. & B. 188; of a covenant in an oil lease to bore for oil; Hukill v. Guffey, 37 W. Va. 425, 16 S. E. 544; and of a covenant to support and render personal services to another: Dunklee v. Adams, 20 Vt. 415, 50 Am. Dec. 44.

The above doctrine must not be taken unqualifiedly. The breach of a covenant in a lease to perform a collateral duty may be relieved against if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred. Equity will relieve against the forfeiture of a covenant to insure, caused by accident or mistake, if the lessor has not been actually injured: Mactier v. Osborn, 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641; of a covenant to prosecute the work of fitting up the premises for certain purposes without delay, where there has been no bad faith on the part of the lessee, or loss sustained by the lessor: Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933; of a covenant to expend a specific sum in repairs: Sanders v. Pope, 12 Ves. 282; and of a covenant to pay taxes and assessments, where the tenant is compelled to pay all the expenses which his delay occasions and no rights have intervened: Giles v. Austin, 62 N. Y. 486. But it is otherwise where the payment of taxes for the present term is made a condition precedent to a renewal of the lease: People's Bank v. Mitchell, 73 N. Y. 406.

In case of a forfeiture under a lease of property in another state, a suit may be maintained in equity to redeem therefrom, and the court will decree the final relief of possession when such relief is incidental to the main object of the suit: Chase v. Knickerbocker Phosphate Co., 32 App. Div. 400, 53 N. Y. Supp. 220.

A forfeiture will not be interfered with where the lessee, in addition to breaking a covenant for which there exists equitable grounds for relief, has broken other covenants against which no equitable relief can be given: Nokes v. Gibbon, 3 Drew. 681, 693; Davis v. West, 12 Ves. 475; Bowser v. Colby, 1 Hare, 109; Wadman v. Calcraft, 10 Ves. 67.

b. **Deeds and Conveyances.**—It is difficult to lay down any general rule as to when equity will relieve from a forfeiture incurred through the failure of a vendee to perform under a contract of conveyance. In the absence of any fraud or improper conduct on the

part of the vendor, it has been said that if the parties choose to contract for a forfeiture a court of equity can afford the vendee no relief: *Brink v. Steadman*, 70 Ill. 241.

The doctrine finds frequent expression that if a contract of conveyance is made to depend upon a condition precedent, so that no rights shall vest in the vendee until he has paid the purchase money or performed some other act, equity will give him no relief where he fails in the performance of the condition: *Wells v. Smith*, 2 Edw. Ch. 78, affirmed in 7 Paige, 22, 31 Am. Dec. 274; *Pell v. Chandos* (Tex. Civ. App.), 27 S. W. 48. Furthermore, that if time is made the essence of the contract, the vendee is precluded from relief in the event of a default: *Benedict v. Lynch*, 1 Johns Ch. 370, 7 Am. Dec. 484; *Wells v. Smith*, 7 Paige, 22, 31 Am. Dec. 274. Neither of these is an unbending rule, however, as will appear from following cases, and also from the cases cited under "Conditions Precedent and Subsequent" and "Time of Performance," *supra*.

When time is not made of the essence of a contract to convey, the vendor is not excused from performance, though the vendee has not paid the purchase money at the stipulated time, if a reasonable excuse for the delay is shown, and no material change has taken place before the tender of performance in the value of the property or the condition of the parties: *Snyder v. Spaulding*, 57 Ill. 480; *Remington v. Irwin*, 14 Pa. St. 143; *Estes v. Browning*, 11 Tex. 237, 60 Am. Dec. 238; *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57. And if time is stipulated for as the essence, but the vendee tenders payment in the evening after sundown, on the day it falls due, there is no forfeiture: *McClartey v. Gokey*, 31 Iowa, 505.

If a vendee is unable to make payment of an installment at the time it matures, equity will relieve him from the resulting forfeiture where the damages arising from the nonperformance are readily ascertainable: *Allison v. Cocke*, 21 Ky. Law Rep. 434, 51 S. W. 593. But if he shows no excuse for failing to pay the installments, and does not tender what is due, there is no ground for the interference of equity: *Pell v. Chandos* (Tex. Civ.), 27 S. W. 48.

While equity will relieve against a forfeiture for nonperformance on the part of the vendee in making payment of installments of the purchase price at the day, still the court will enforce performance within a reasonable time: *Button v. Schroyer*, 5 Wis. 598.

Where a party is too sick to attend to business at the time when a payment becomes due, that fact will prevent a forfeiture of his right under the conveyance on account of his failure to make payment at such time, especially if after recovery he seeks permission of the other party to make the payment, and the latter shows by his conduct that he intended, from the time of the default, to insist upon the forfeiture, and that he would not have accepted any subsequent tender: *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593.

Where a contract for the sale of land stipulates that upon the failure of the vendee to pay the taxes accruing thereafter the contract will be considered forfeited, his failure to pay them before they become delinquent, and the payment of them by the vendor, do not work a forfeiture, if the vendee tenders to him, soon after, the amount thus paid with interest. And this though the contract for the payment of the purchase money, and of the taxes, stipulates that time is of the essence, since there is no precise time fixed for the payment of the taxes: *McClartey v. Gokey*, 31 Iowa, 505.

When compensation can be made by a grantee for a breach of a condition subsequent in the contract of conveyance, ordinarily he is entitled to relief from the forfeiture: *Donnelly v. Eastes*, 94 Wis. 394, 69 N. W. 157. But if the case is such that full compensation cannot be determined or made so as to place the grantor in the position in which he would have been but for the breach, equity will not interfere: *Parsons v. Smilie*, 97 Cal. 647, 32 Pac. 702.

A condition in a deed of land subject to a mortgage that the grantee shall pay the principal and interest at maturity, and save the grantor harmless therefrom, is considered as security for the performance of a pecuniary obligation, and equity will relieve the grantee from a forfeiture due to his default in the payment: *Steel v. Branch*, 40 Cal. 3; *Sanborn v. Woodman*, 5 Cush. 36. In *Hancock v. Carlton*, 6 Gray, 39, there had been a breach of a condition to indemnify against a mortgage. The court refused relief, but on the ground that the forfeiture was caused by the laches of the party seeking relief. It was intimated in the opinion, though, that relief would have been granted on the ground of accident or mistake, if proved.

And where a grantee covenants to maintain the grantor with food and lodging, and the grantee incurs a forfeiture by unintentional nonperformance of the covenant, he is entitled to relief: *Henry v. Tupper*, 29 Vt. 358. See, also, in this connection, *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Dunklee v. Adams*, 20 Vt. 415, 50 Am. Dec. 44. In *Messersmith v. Messersmith*, 22 Mo. 369, a mother conveyed land to her son on condition that he should provide for her maintenance during her life. Having maintained her several years, he died without making any express provision for her support by will or otherwise, but leaving her ample means for her support, which his representative offered to apply to such purpose. It was held that the case was a proper one for equitable relief.

Where A and B unite to purchase property on credit under an agreement that in case B fails in paying his share so that A has to pay it, A is to have the entire property, and is to repay B any money he may have paid in, and B contributes nothing toward the first payment, whereupon A inequitably attempts to exclude him

from the property, he is entitled to relief from the forfeiture: *Asher v. Pendleton*, 6 Gratt. 628.

c. **Mortgages.**—Relief in equity against forfeitures is based on the doctrine that the possessor of a legal right shall not be allowed to use it to work oppression or injustice; and if a mortgagor can bring himself within this principle, it is the duty of the court to administer proper relief when it can do so without injustice to others: *Sandford v. Flint*, 24 Mich. 26; *Union Mut. Life Ins. Co. v. Union Mills etc. Co.*, 37 Fed. 286. A court of equity will not permit a mortgagee or his assignee to take an unconscientious advantage of the mortgagor who is willing to pay at the time prescribed, but who is unable to do so in consequence of the act of the other party. Especially is this true where there is reason to believe that the default in payment was the result of a mere trick or artifice to defraud the mortgagor of his rights by depriving him of the power of making the payment at the time prescribed: *Noyes v. Clark*, 7 Paige, 179, 32 Am. Dec. 620; *Adams v. Rutherford*, 13 Or. 78, 8 Pac. 806. The rule is, it is said in *Asendorf v. Meyer*, 8 Daly, 278, that the court will interfere where the mortgagor does anything to prevent the mortgagor from tendering payment in time, or where the mortgagor has made an honest but unsuccessful attempt to find the mortgagee, and tender him the money.

The parties to a mortgage have the right to make an extension dependent upon the punctual payment of interest at the times fixed for that purpose. And, if from the mere negligence of the mortgagor in performing his contract, he suffers the whole debt to become due and payable according to the terms of the mortgage, no court will interfere to relieve him from the payment: *Noyes v. Clark*, 7 Paige, 179, 32 Am. Dec. 620; *Ruggles v. Southern Minn. R. R. Co.*, Fed. Cas. No. 12,121. However, if the mortgagor makes a delay of only a few days in the payment of interest and then makes a tender, he should be relieved, when he is guilty of no bad faith, and is mistaken as to the time of payment: *Lynch v. Cunningham*, 6 Abb. Pr. 94; *Asendorf v. Meyer*, 8 Daly, 278. And where the mortgagor, in good faith and upon reasonable grounds denies his liability to pay interest, or if he is liable, claims to have paid it, he cannot be made liable under the provision of the mortgage, that on default in the payment of interest the whole principal should become due in the option of the mortgagee, though it should turn out that he is in error: *Wilcox v. Allen*, 36 Mich. 160, 169.

A mortgagee will not be allowed to so execute a power of sale as to compel the mortgagor to pay more than he owes, or to forfeit his estate, and if this is attempted, either by mistake or through fraud, a court of equity, when appealed to in proper season and manner, will prevent the forfeiture by allowing the party to pay.

the true sum in redemption of the estate: *Sandford v. Flint*, 24 Mich. 26.

When a mortgage is conditioned to support the mortgagee, and the mortgagor conveys the property, the purchaser will be let in to perform the condition by making compensation for past support and making an allowance for future maintenance: *Austin v. Austin*, 9 Vt. 420.

In *Noyes v. Anderson*, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316, a mortgagee agreed not to foreclose the mortgage for a certain period, so long as no taxes or assessments on the premises remained unpaid and in arrears for more than thirty days. Through the failure, but not the willful neglect, of the mortgagor's agent with whom she left money sufficient to make payment, a sewer assessment remained unpaid for over thirty days. But upon learning the fact the mortgagor promptly paid the assessment the day before the summons was served upon her to foreclose the mortgage. It was held that she should be relieved from the consequences of her default in the payment of the assessment: See, also, *Smalley v. Ranken*, 85 Iowa, 612, 52 N. W. 507.

The mere fact that a mortgage stipulates for an excessive rate of interest, there being no usury statute, will not prevent the enforcement of the obligation, where it appears that the creditor practiced no fraud or undue influence: *Palmer v. Leffler*, 18 Iowa, 125.

Equity cannot relieve against statutory forfeitures. Therefore courts are powerless to extend the time for redemption from a statutory foreclosure, when redemption within such time has been prevented by misfortune or sickness: *Cameron v. Adams*, 31 Mich. 426.

d. *Devises*.—The cases in which relief has been sought from forfeitures occasioned by the breach of a condition in a devise are not numerous. They are uniform, however, in holding that a court of equity, under proper circumstances, may intervene to relieve from a default of a devisee. Thus, where one devised his real estate to his sons on condition that they should pay a certain amount of money within a specified time to his daughters, and, in consequence of the default of the devisees in making payment, the heirs at law became entitled to the estate, relief was granted, against the effect of the breach of condition, on payment of the money with interest: *Walker v. Wheeler*, 2 Conn. 299. To the same effect is *Barnardson v. Fane*, 2 Vern. 366.

Equity will relieve a remainderman from a forfeiture of the estate caused by the failure of the life tenant to pay a certain sum to the executors required by a provision of the will, on the payment of such sum, with interest: *Carpenter v. Westcott*, 4 R. I. 225; approved in *Thompson v. Whipple*, 5 R. I. 144.

And where a will provides that the daughter of the testatrix shall have the use of the homestead for life, but that her failure to pay

the insurance and taxes shall work a forfeiture, equity has jurisdiction to relieve her from the consequences of nonpayment of taxes, due to her ignorance of her rights, on the payment of the taxes and costs: *Tibbetts v. Cate*, 68 N. H. 550, 22 Atl. 559.

e. **Corporate Stock.**—The forfeiture of corporate stock for the nonpayment of calls and assessments, regularly and duly incurred under the charter and by-laws, or under a contract between the stockholder and the corporation, will not ordinarily be relieved against by a court of equity: *Weeks v. Silver Islet etc. Co.*, 8 N. Y. St. 110; *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330; *Germantown etc. Ry. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Sparks v. Liverpool Waterworks Co.*, 13 Ves. 428; *Sudlow v. Dutch etc. Ry. Co.*, 21 Beav. 43. Equity will not interfere by injunction to prevent a threatened forfeiture pending the adjustment of a dispute as to the amount due on the stock: *Naylor v. South Devon Ry. Co.*, 1 De Gex & S. 32.

However, any power to forfeit stock must be followed strictly: *Germantown etc. Ry. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546. And equitable relief will be extended against an illegal or irregular forfeiture: *Mitchell v. Vermont etc. Min. Co.*, 67 N. Y. 280; *Walker v. Ogden*, 1 Biss. 287, Fed. Cas. No. 17,081; *Sweny v. Smith*, L. R. 7 Eq. 324. Equity will see that a shareholder, when his stock is sold, gets credit for what it should bring if sold properly: *Stubbs v. Lister*, 1 Younge & C. 81. And if directors make a call, threatening to forfeit the shares of those who refuse to respond, they will be enjoined from selling such shares as are paid up in full: *Moore v. New Jersey Lighterage Co.*, 5 N. Y. Supp. 192, 23 N. Y. St. 213.

But when a shareholder seeks relief from a forfeiture of his stock declared for his failure to meet calls and assessments, he should show a willingness to do equity by discharging the amount due on the stock. On a bill to redeem his stock from an unwarranted or irregular sale, he should tender the amount due with interest: *Walker v. Ogden*, 1 Biss. 287, Fed. Cas. No. 17,081. And an injunction will not issue to restrain the sale of stock to satisfy a delinquent assessment, merely because the notice of sale has been published for an insufficient length of time, unless the shareholder has paid or offered to pay the assessment: *Burham v. San Francisco Fuse Co.*, 76 Cal. 26, 17 Pac. 939.

Moreover, the shareholder seeking relief must not be guilty of laches. Equity will refuse to assist a stockholder who acquiesces in a forfeiture of his shares as long as they are valueless, and then when they become valuable by reason of changed circumstances, or by the efforts of others, seeks to be reinstated in the rights which he has previously repudiated: *Sayre v. Citizens' Gas etc. Co.*, 69 Cal. 207, 7 Pac. 437, 10 Pac. 408; *Raht v. Sevier Min. etc. Co.*, 18

Utah, 290, 54 Pac. 889. See, too, *Hayward v. National Bank*, 98 U. S. 611.

f. **Insurance Policies.**—A condition in a policy of life insurance that if the stipulated premium is not paid on or before a certain day the policy shall cease and determine is of the essence of the contract of insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do. If the forfeiture of a policy is incurred by the neglect of the insured to meet his premiums at maturity, equity will not lend its aid to relieve him from the forfeiture: *Matter of Attorney General v. Continental Life Ins. Co.*, 93 N. Y. 70; *Klein v. Insurance Co.*, 104 U. S. 88; *Kellner v. Mutual Life Ins. Co.*, 43 Fed. 623.

This holds true where a premium note is given instead of a cash payment of the premium in advance. If the note or the interest on it is not paid when due, equity cannot relieve the insured from the resulting forfeiture: *Helm v. Metropolitan Life Ins. Co.*, 7 Daly, 536; *Sanderson v. New England Life Ins. Co.*, 1 Disn. 855.

But, as in other cases of forfeiture, there may be circumstances attending the forfeiture of an insurance policy that will give a court jurisdiction to grant equitable relief. If, by reason of misrepresentations and unauthorized acts of an insurance company in demanding of the insured an assessment in addition to his premiums, he is misled and induced not to pay his premiums, he is entitled, if living, to be reinstated, or, if dead, his beneficiary may recover on the policy upon the payment of premiums due: *Colby v. Life Indemnity etc. Co.*, 57 Minn. 510, 59 N. W. 539. So, where a woman, holding a nonparticipating policy on the life of her husband, mails to the company the amount of premium she supposes due, and the company receives it in time to give her notice of its insufficiency, but, delaying in so doing, sends notice of the forfeiture of the policy, and refuses to receive the correct amount which she tenders, she is entitled to have the policy declared in force, and formal annual tender of premiums is not necessary after the refusal. The judgment, in such case, should provide for the payment of the premiums due with interest: *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516, 29 Am. Rep. 200.

If an unjust and unlawful assessment is made on a member of a mutual life insurance company, which he refuses to pay, but tenders payment of his proper assessment, he may maintain a suit to have his policy recognized and himself reinstated, if a forfeiture is declared: *Bagley v. Mutual Reserve etc. Assn.*, 54 N. Y. Supp. 189, 24 Misc. Rep. 634.

When an insured secures premium loans on his policy, and the note which he gives stipulates that if the interest thereon is not

paid at maturity the policy may be sold, and the policy is sold, because of the nonpayment of sufficient interest, where the amount of interest paid together with the dividends on the policy to which the insured is entitled is sufficient to satisfy the interest, equity will relieve against the forfeiture at the suit of the beneficiary: *Union Cent. Life Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355. Yet in case one to whom a life insurance policy is made payable seeks to enforce it in equity on the ground that, although all the premiums have not been paid, still there are dividends which should be applied to such payments, it should appear that the dividends are sufficient to prevent the lapsing of the policy. The bill is demurrable in the absence of such showing: *Bulger v. Washington Life Ins. Co.*, 63 Ga. 328.

Where a policy in a mutual life insurance company has been forfeited by failure to pay the premiums upon the day fixed, and the holder has the right, upon certain terms, which he is able to and willing to fulfill, to be relieved from his default, his remedy against the company is in equity for relief, in the nature of specific performance, and not by mandamus: *Bradbury v. Mutual Reserve etc. Assn.*, 53 N. J. Eq. 306, 31 Atl. 775.

If the failure to pay the premiums on a life insurance policy is caused by the intervention of war between the territories in which the insurer and the insured respectively reside, which makes it unlawful for them to hold intercourse, it has been held that the case is a proper one for the exercise of the equitable powers of a court: *Cohen v. New York etc. Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Martine v. International etc. Ins. Co.*, 53 N. Y. 339, 13 Am. Rep. 529; *Bird v. Penn Mut. Life Ins. Co.*, 2 Week. Notes, 410, Fed. Cas. No. 1430. But it is held in *New York Life Ins. Co. v. Stratham*, 93 U. S. 24, that the policy, in such case, is forfeited, and the insured is only entitled to the equitable value of the policy arising from the premiums actually paid.

g. Notes and Bonds.—There is nothing contrary to equity or good conscience for parties to a transaction to stipulate that default in the payment of interest at stated intervals of time shall leave it optional with the creditor to insist on the payment of the whole debt. Hence, if a promissory note provides for the payment of interest quarterly, and if default is made therein the whole note shall immediately fall due at the option of the holder, a failure to pay the interest makes the principal due, and equity will not relieve against the enforcement of the contract: *Whitcher v. Webb*, 44 Cal. 127, cited with approval in *Swearingen v. Lahner*, 93 Iowa, 147, 57 Am. St. Rep. 261, 61 N. W. 431.

One induced to execute a bond for one hundred and fifty pounds, when he owes only one hundred, the extra fifty pounds being re-

garded as a penalty to secure prompt payment, is entitled to relief from the penalty: *Dawson v. Winslow*, Wythe, 106 (114).

h. Statutory Forfeitures.—Penalties and forfeitures imposed by statute do not stand upon the same footing as those stipulated for by parties to a contract. They are a declaration of the legislative will, which courts of chancery cannot dispense with any more than courts of law. They will seldom, if ever, be interfered with in equity: *Chandler v. Crawford*, 7 Ala. 506; *State v. McBride*, 76 Ala. 51; *Cameron v. Adams*, 31 Mich. 426; *Smith v. Mariner*, 5 Wis. 551, 68 Am. Dec. 73; *Clark v. Barnard*, 108 U. S. 436, 455, 2 Sup. Ct. Rep. 878; *Peach v. Somerset*, 1 Strange, 447; *Keating v. Sparrow*, 1 Ball & B. 367, 373. It is even said that a court of equity will enforce such penalties in a proper case: *State v. Hall*, 70 Miss. 678, 18 South. 39. But see, *Cross v. McClenahan*, 54 Md. 21; *Broadnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633.

Where a lease is forfeited under the provisions of a statute providing a summary mode of proceeding for landlords against their delinquent tenants, this is a forfeiture over which a court can exercise no control; for to do so would be impugning the authority of the statute: *Gorman v. Low*, 2 Edw. Ch. 824.

In the enforcement of the United States revenues, it may happen that hardship and injustice may be occasioned to those who inadvertently violate their provisions and incur the penalties and forfeitures for which they provide. But this gives a court of equity no right to interfere and virtually to repeal the express provisions of a positive statute, or defeat their operation in a particular case: *Powell v. Redfield*, 4 Blatchf. 45, Fed. Cas. No. 11,859.

i. Bail Bonds and Undertakings.—It is a general rule that equity will not take from one a legal advantage which he has gained against a bail, if such advantage happens without any participation or agency on his part. The bail cannot be released from his liability: *Gilliam v. Allen*, 4 Rand. 498; *Dickinson v. Sizer*, 4 Rand. 113. Bail will not be relieved by a court of equity from a judgment against him at law, unless good cause appears for not defending at law: *Brown v. Toell*, 5 Rand. 543, 16 Am. Dec. 759. If he makes no defense at law or does not appear to defend when the judgment is confirmed, he is not entitled to relief: *Carter v. Cockrill*, 2 Munf. 448; *Allen v. Hamilton*, 9 Gratt. 255. It is otherwise if the bail has regularly no day in court. Thus one who denies executing a bond is not precluded from obtaining relief by failing to appear and plead non est factum at law after being informed that his name is subscribed to the bond: *Spotswood v. Higgenbotham*, 6 Munf. 313.

Precise performance on the part of a surety is not always required. Where the surety on a delivery bond has made an honest and faithful effort to deliver the property at the precise time fixed in the bond, and would have done so but for an unforeseen casualty

bound by the judgment in the suit. The rule rests upon the presumption that every man is attentive to what passes in the courts of justice in the state or sovereignty in which he resides, and is founded upon public policy; for otherwise alienations and transfers of title made during the pendency of a suit might defeat its whole purpose, and there would be no end to litigation." This doctrine applies with much greater force where the purchaser is an actual party to the suit. Equity will not permit a defendant in a suit, by collusion with his codefendant, to purchase any portion of the subject of litigation, and thereby defeat the object of the suit. It often is the case that the timber standing on a tract of land is of as much value as the land itself, and if, during the pendency of a suit to subject such a tract to the satisfaction of a judgment lien, the defendant were allowed to sever and sell the timber, great injustice might be done: See Freeman on Judgments, sec. 193.

Wade, in the Law of Notice, section 338, quotes from Lord Cranworth in *Bellamy v. Sabine*, 1 De Gex & J. 566: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice. . . . It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party." The same author, section 567, says: "The rule does not operate simply to prohibit litigant parties from transferring their interests. It also prevents others from purchasing while the title is being litigated."

It is contended by counsel for the appellees that the appellant could not claim the logs because he was a purchaser at judicial sale, and the land was not sold until long after the timber had been removed from it, and having purchased the land after the timber had been removed from it, he took by his purchase the land as it was at the time of sale. Now, while it is true that the appellant could only purchase the land in the condition it was, shorn of timber, yet if the timber had remained intact the land might have sold for enough to satisfy the plaintiff's debt; and this serves to illustrate the wisdom of the law which prevents *pendente lite* purchaser from acquiring title to the property he purchased, and prevents litigant parties from selling the property ⁴⁴⁸ during the pendency of the litigation. When this suit was instituted the trees growing thereon were a part of the land, and as such subject to the judgment lien, and equity will not allow a sale of timber to a codefendant to dis-

place and defeat the lien. If this could be done, defendants in suits of this character would be constantly removing houses from lots to escape the effect of judgment liens, and so with other species of property that constitute a portion of the realty: See *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505; *Hutchins v. King*, 1 Wall. 53, 60; *Gore v. Jenness*, 19 Me. 53; *Frothingham v. McKusick*, 24 Me. 403.

By section 1 of chapter 74 of the code it is provided that: "Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, . . . with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers, or other persons, their representatives or assigns, be void."

In this case, there can be no question as to the fact that D. M. McLain had notice of the fraudulent intent of said Franklin McLain in making the sale of said timber to him.

Wait on *Fraudulent Conveyances*, section 24, in response to the question, What interests, then, can be reached by creditors? says: "Manifestly, all tangible property, whether real or personal, which would have been subject to levy and sale under execution, is susceptible of fraudulent alienation, and may be reclaimed and recovered by the creditor where it has been transferred by the debtor with the requisite fraudulent intention." In the same section the author says: "It has long been observed that the principle toward which the highest courts in England and in all the states are more or less rapidly working, is that the entire property of which a debtor is the real or beneficial owner constitutes a fund which is primarily applicable to the fullest extent to its entire value to the payment of its owner's debts. And the courts will not allow any of that value to be withdrawn from such primary application, if they can find any legal or equitable ground on which to prevent such withdrawal."

Where a lien was created on oil leases and other property by attachment, this court held (*Bowlby v. De Witt*, 47 W. Va. 323, 34 S. E. 919) that: "The title of one who purchases of an attachment debtor property levied on under it with intent to defeat such levy is void."

⁴⁴⁹ In the case at bar there can be no question as to the fact that D. M. McLain purchased the logs with full notice of the fraudulent intent on the part of Franklin McLain in cutting and removing the same from the real estate sought

to be subjected to said judgment lien; and such being the case, in accordance with the authorities above cited, the sale was imperative, and he acquired no title thereto. My conclusion is that the circuit court erred in refusing to appoint a receiver to take charge of said logs, in dissolving said injunction, and in dismissing the plaintiff's petition.

The decree is reversed and the cause remanded.

The Law of *Lis Pendens* is considered in the monographic note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 853-878. A purchaser of land pendente lite takes his title therein subject to the final decree: *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083. *Lis pendens* is notice to one who buys timber standing on land from a party to a suit of the rights and interests of the complainant therein: *Alliance Trust Co. v. Nettleton Hardwood Co.*, 74 Miss. 585, 60 Am. St. Rep. 531, 21 South. 396.

SHAHAN v. SHAHAN.

[48 W. Va. 477, 37 S. E. 552.]

ESTATES OF DECEDENTS—SALE OF, WHEN SUBJECT TO LIENS.—The real property of a decedent, however subject to liens, may be sold by order of court, and the right of lienholders will be protected either by selling subject to their liens, or directing payment thereof to be made from the proceeds of the sale. (p. 68.)

BUILDING AND LOAN ASSOCIATIONS.—ON THE DEATH OF A BORROWING MEMBER of a building and loan association, all fines against him must cease and his accounts be settled as though there had been a voluntary payment and withdrawal. (p. 68.)

APPELLATE JURISDICTION—COSTS.—Where an appellate court has jurisdiction only when the amount in controversy exceeds one hundred dollars, it cannot review an allowance for costs which does not amount to that sum. (p. 69.)

S. M. Musgrove, for the appellant.

W. R. D. Dent, for the appellee.

⁴⁷⁷ DENT, J. The Monumental Savings and Loan Association appeals from a decree of the circuit court of Taylor county in the chancery cause of Winifred Shahan's administrator against Winifred Shahan's heirs, etc.

The appellant has a trust lien on the real estate of the decedent, ⁴⁷⁸ which the court, on report of a commissioner, as-

certained to amount to the sum of eleven hundred and twelve dollars, and decreed accordingly. The appellant claims that the court erred in not selling the equity of redemption subject to the appellant's lien, instead of selling the property as a whole on terms different from those contained in the deed of trust. This being a suit by the administrator under section 7, chapter 86, of the code, to sell the real estate of a decedent to pay her debts, the court had the right to sell the property in such manner and on such terms as would be best for all the parties in interest. Death ended the relation existing between the appellant and the decedent: 4 Am. & Eng. Ency. of Law, 2d ed., 1029; Thompson on Building Associations, 66, 67.

Under section 3, chapter 86 of the code, decedent's real estate became assets for the payment of her debts: *Rex v. Creel*, 22 W. Va. 373. "The fact that the real estate of a deceased debtor is subject to encumbrances of any sort, such as mortgages, rights of dower, curtesy, etc., does not affect its liability to be sold under an order of court for the payment of debts, even though in case of a mortgage an action for foreclosure is pending, but the rights of the encumbrancer will always be protected, either by selling subject to the encumbrance, or by discharging it out of the proceeds of sale": 11 Am. & Eng. Ency. of Law, 2d ed., 1092, 1135, 1159. The case of *Wise v. Taylor*, 44 W. Va. 492, 29 S. E. 1003, is not applicable to a decedent's real estate.

The appellant further claims that it should have been allowed eleven dollars fines accrued after the death of Mrs. Shahan. This would be wholly improper, as her death ended her membership, and there being no hand to pay, fines could not be imposed against her, but the appellant's account should be settled as though there was a voluntary payment and withdrawal: 4 Am. & Eng. Ency. of Law, 2d ed., 1030. It further claims that it should have been allowed one hundred dollars attorney's fee, instead of twenty-five dollars. The circuit court and commissioner having fixed on this amount, this court cannot disturb it without evidence to justify such action. It seems to have been allowed merely under the provisions of the trust deed for services in defending this cause. The appellant claims because its trustee does not get to sell the property and earn the commissions for so doing, it should have an attorney's fee commensurate with such commissions. This is not a sufficient equitable ground on ⁴⁷⁹ which to base such allowance. The deed of trust only provides that the grantor "will promptly

pay all fees, costs, and expenses to or for which such association or said trustees may become subject or liable by reason of any litigation involving, growing out of or in any wise touching this transaction, and will hold the said association and said trustee harmless therefrom." It also claims an allowance of a withdrawal fee of one dollar per share, amounting to the sum of ten dollars, which would change the withdrawal value of decedent's shares from forty-five dollars to thirty-five dollars. The by-laws are not before this court, and therefore it is impossible to say the commissioner's finding was wrong. She did not voluntarily withdraw, but death ended the relation she bore to them, and it would be unjust to charge her estate with such withdrawal fees, unless the by-laws so provided. These three sums amount to ninety-six dollars, and appear to be the whole controversy continued in this court, and is beneath its jurisdiction.

The appellees cross-assign as error the allowance of the attorney's fee of twenty-five dollars, which is subject to the same answer as is given to appellant. Also that the premium charged should not be allowed in addition to the interest, as it is payable in monthly installments of five dollars per month, and is, therefore, nothing but usurious interest. The by-laws not being before us, we are unable to say that the premium was not a fixed sum payable in monthly installments: *Endlich on Building Associations*, 391.

The sum of twenty-two dollars and twelve cents taxes allowed the sheriff for 1892 is beneath the jurisdiction of this court, and it has no power, though it be an erroneous allowance, to correct it: *Fleshman v. Fleshman*, 34 W. Va. 342, 350, 12 S. E. 713.

No reversible error affirmatively appearing, the decree is affirmed.

The Sale of the Real Property of a Decedent will be directed when there is a deficiency in the assets necessary to pay his debts: *Pearson v. Gillenwaters*, 99 Tenn. 446, 63 Am. St. Rep. 844, 42 S. W. 9. The effect of such sale where the property is mortgaged is discussed in *Reed v. Aubrey*, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022.

Building and Loan Association.—The effect of the death of a borrowing member in a building and loan association is considered in *Leahy v. National etc. Assn.*, 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

WOOD v. STATE.

[128 Ala. 27, 29 South. 557.]

HOMICIDE.—ONE WHO INTERVENES IN A DIFFICULTY in behalf of his brother and takes the life of the other combatant stands in the shoes of his brother in respect of the fault in bringing on the difficulty, and cannot defend on the ground of his brother's peril, unless the latter could so defend. (p. 72.)

HOMICIDE IN DEFENSE OF ANOTHER—EVIDENCE.—In a prosecution for an assault with intent to murder, committed by one in intervening in a controversy in behalf of his brother and taking the life of the other combatant, evidence bearing upon the fault of such brother in bringing on the difficulty is admissible. (p. 72.)

HOMICIDE IN DEFENSE OF ANOTHER—EVIDENCE.—In a prosecution for an assault with intent to murder, committed by one in intervening in a controversy in behalf of his brother and taking the life of the other combatant, evidence of the particulars of a previous difficulty between such brother and the deceased is not admissible. (p. 72.)

ASSAULT WITH INTENT TO MURDER.—IT IS NOT ESSENTIAL to a conviction for assault with intent to murder that the defendant acted deliberately and with premeditation. (p. 72.)

Felix Wood, the appellant, Marion Wood, his brother, and four others were indicted jointly for an assault with intent to murder one Brooks. The appellant was convicted. The day before the commission of the offense charged, Brooks and Marion Wood had some difficulty. On the day of the assault, Marion Wood stepped up to Brooks, and, after a few words had passed between them, they drew their pistols and began firing at each other. Whereupon, the defendant, who, during the conversation, had stood some ten yards away and had taken his

rifle from its case, fired at Brooks. The defendant requested the following instructions. The request was refused, and the defendant excepted: 1. "If the jury believe from the evidence that the defendant, seeing his brother Marion Wood in a desperate encounter with Brooks, shot at Brooks for the purpose of defending his brother, without knowing the origin of the difficulty, the jury may consider these facts in determining whether the defendant acted maliciously, premeditatedly, and deliberately or justifiably"; 2. "If the jury believe all the evidence, they cannot convict the defendant of an assault with intent to murder"; 3. "The court charges the jury that defendant was not bound to inquire into the origin of the difficulty between his brother and Brooks, but had the right to act from appearances"; 4. "The court charges the jury that defendant would not be guilty as charged in the indictment if when he finds his brother was apparently in danger of death or great bodily harm, at the hands of Brooks"; 5. "If the jury have a reasonable doubt from the evidence of any one of the following propositions being true, they must acquit him of an assault with intent to murder: 1. That the defendant acted maliciously; 2. That he acted deliberately; 3. That he acted with premeditation."

No counsel indicated as appearing for the appellant.

Charles G. Brown, attorney general, for the state.

³⁰ McCLELLAN, C. J. One who intervenes in a pending difficulty in behalf of a brother and takes the life of the other original combatant stands in the shoes of the brother, in respect of fault in bringing on the difficulty, and he cannot defend upon the ground that his brother was in imminent and deadly peril and could not retreat, unless the latter could have defended upon that ground had he killed his assailant. Hence in such cases it is a material inquiry whether defendant's brother was at fault in bringing on the difficulty with the deceased, and the same doctrine obtains, of course, where the charge is assault with intent to murder; and as bearing upon this inquiry presented in the case at bar the court properly admitted the testimony of Brooks to the effect that Marion Wood approached him with his hand in his pocket ³¹ and apparently on a pistol and said: "I came to see you about what you did to me yesterday." It is of no consequence that Felix Wood, the defendant, did not hear this remark and was not,

when he intervened, aware of any fault on the part of Marion in bringing on the difficulty. He entered into the combat at his own peril: *Gibson v. State*, 91 Ala. 64, 9 South. 171; *Whatley v. State*, 91 Ala. 108, 9 South. 236; *Karr v. State*, 106 Ala. 1, 17 South. 328. Upon this principle, as well as for other considerations, charges 1, 3, and 4 were properly refused to the defendant. Moreover, the evidence referred to was clearly admissible upon the further grounds: 1. That it was of the res gestae of the main fact; and 2. There was other evidence from which the jury might have found that the difficulty was the result of a conspiracy between Marion Wood, the defendant and others to assault and kill Brooks.

The trial court did not err in excluding testimony going to the particulars of the previous difficulty between Brooks and Marion Wood: *Stewart v. State*, 78 Ala. 436.

Charge 5 was properly refused. It is not essential to a conviction of an assault with intent to murder that the defendant acted deliberately and with premeditation: *Meredith v. State*, 60 Ala. 441; *Lawrence v. State*, 84 Ala. 425, 5 South. 33; *Welch v. State*, 124 Ala. 41, 27 South. 307; *Gilmore v. State*, 126 Ala. 21, 28 South. 595.

The affirmative charge was of course properly refused to defendant, there being evidence tending to prove every averment of the indictment and the plea being "not guilty."

Affirmed.

Homicide in Defense of Another.—Whatever one may do in his own defense, another may do for him, even to taking life, if he believes life is in imminent danger, or if such danger is reasonably apparent, provided the party in whose defense he acts is not in fault. He interferes, however, at his peril if the person slain was not in fault: *Stanley v. Commonwealth*, 86 Ky. 440, 9 Am. St. Rep. 305, 6 S. W. 155. See, further, the monographic note to *State v. Sumner*, 74 Am. St. Rep. 735-737.

WALKER v. CLIFFORD.

[128 Ala. 67, 29 South. 588.]

IMPLIED EASEMENTS ARE LIMITED to such as are apparent, continuous, and necessary to the estate granted or retained. (pp. 74, 75.)

IMPLIED EASEMENT.—IF ONE LEASES DIFFERENT PORTIONS OF THE SAME BUILDING to two tenants, an implied easement or right of way through the premises of one tenant to the premises of the other does not arise, when it is not a necessity, but only a convenience. (p. 76.)

EASEMENT—WHO MAY ENFORCE.—IF ONE LEASES different portions of the same building to two tenants, and one of them claims a right of way through the premises of the other, he, and not the lessor, is the proper party to sue for the obstruction of the easement, where the obstruction is not an injury to the reversion. (pp. 76, 77.)

The complainant, executor of W. S. Mudd, deceased, leased a hotel to the defendants. He reserved a portion of the building however, which portion he leased to R. D. Burnett Company, which used it for a saloon and billiard-room. The billiard-room did not open on the street, but was accessible only through the bar-room and the hotel rotunda. The entrance to the saloon was on the street, and on the same street was the entrance to the hotel. In the hotel rotunda was a door opening into the billiard-room, back of the bar. This door the defendants obstructed and closed. The R. D. Burnett Company then called on the complainant to keep such door open. The complainant thereupon filed a bill to enjoin the obstruction of the right of way contended for. A temporary injunction was granted. The appeal in this case is from a decree dissolving it.

Cabaniss & Weakley, for the appellants.

Rudolph & Huddleston, for the respondents.

⁷³ HARALSON, J. 1. In 10 American and English Encyclopedia of Law, second edition, 420, it is said, with the citation of many authorities to support the text, that: "According to the established English doctrine, which is supported by some of the later American authorities, if the owner of both the quasi dominant and quasi servient tenements ⁷⁴ conveys the former, reserving the latter, all such continuous and apparent quasi easements as are reasonably necessary to the enjoyment of the prop-

erty granted, pass to the grantee, giving rise to easements by implied grant. If, on the other hand, the quasi servient tenement is granted, while the quasi dominant tenement is retained, no easement is reserved by implication, unless it is strictly necessary to the enjoyment of the property retained. These rules are founded on the principle that a grantor shall not derogate from his own grant." "A dominant estate is the one enjoying the easement, and to which it is attached; the servient estate is the one upon which the easement is imposed": Tiedeman on Real Property, sec. 497.

In *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85, it is said: "The American cases have, with almost entire unanimity, limited easements by implied grants to such as were open, visible—such as would be apparent to any ordinary observer—continuous, and necessary to the enjoyment of the estate granted or retained. . . . These cases differ considerably as to the degree of necessity which must exist in order to raise the implication that the easement or quasi easement passes; but they all concur in the rule just stated, that it must be one which is open, visible and necessary."

Mr. Tiedeman states the rule thus: "If the quasi servient estate has been conveyed, it is a question of some doubt whether there is reserved to the grantor by implication an easement to maintain the drain or other burden upon the granted estate. The authorities, English and American, are at variance on this question. In this country the better opinion is that the rule would be the same as in the case of the conveyance of the quasi dominant estate, especially if it was strictly necessary to the enjoyment of the dominant estate, and the existence of the easement is apparent or known to the grantee": Tiedeman on Real Property, sec. 602.

The same author further observes (section 609): "When such a necessity exists as will create by implication a right of way is a question of fact determined by the circumstances of each particular case. Mere ⁷⁵inconvenience will not constitute such necessity. It must be strict necessity; but excessive expense in procuring another way would make it a case of strict necessity."

The complainant's counsel say in their brief: "The doctrine upon which complainant's bill rests is that announced in *Lampman v. Milks*, 21 N. Y. 505. It is this [quoting from the decision]: 'Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the pur-

chaser takes the tenement or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains.' ” But this principle, as there announced, was afterward declared to be a dictum, was limited to the facts of that case, and repudiated as unsound, in *Wells v. Garbutt*, 132 N. Y. 435, 30 N. E. 978, where the court, citing a great array of authorities to sustain the proposition, announced that “where the owner of two parcels of land conveys one by an absolute and unqualified deed, we think that an easement will be implied in favor of the land retained by the grantor and against the land conveyed to his grantee, only in case the burden is apparent, continuous and strictly necessary for the enjoyment of the former.” See, also, 6 American and English Encyclopedia of Law, first edition, 143, note 1, where the authorities are collated to sustain the foregoing principle. We apprehend that the doctrine laid down in the text-books as above referred to, and in *Wells v. Garbutt*, 132 N. Y. 435, 30 N. E. 978, sustained as it seems to us on reason and authority, is the correct one in reference to easements by implication: *Ramsey v. McCormick*, 4 Cal. 245; *Oliver v. Dickinson*, 100 Mass. 116.

2. The appeal in this case is from a decree dissolving the preliminary injunction, granted in favor of complainant. The defendant's motion to dissolve was predicated on the grounds that there was no equity in the bill, and on the denials contained in their sworn answer theretofore filed.

The right of complainant to maintain the bill rests solely on the ground of an implied easement or right of way over respondents' premises, existing from convenience ⁷⁶ and necessity, which respondents deny, setting out, as a part of their denial, the lease of complainant to them, and the facts on which they base the denial, which are not questioned by complainant. The easement claimed is not reserved in the contract of lease to respondents, and necessarily arises, if at all, by implication. That part of the premises retained by complainant, and not rented to defendants, and every part thereof, is easily accessible from the street, and the way claimed over the premises granted by him to defendants is, therefore, clearly not a way of necessity, but one merely of convenience to his other tenant, the Burnett Company. The way into the bar-room is approached, as the hotel rotunda is, by a door, as stated, opening from the same street; and between this and the billiard-room in the rear there are glass doors for entrance into the latter from the

front room, so that customers of the Burnett Company may pass freely in and out of the bar-room and billiard or pool-room, without hindrance or inconvenience. On this denial, alone, the chancellor very correctly dissolved the injunction.

3. Furthermore, a lessee or termor in possession under a valid lease, may, during the continuance of his lease, maintain an action of ejectment or other proper action against his lessor, even, although he is the owner of the fee, less the term, as against any other person who takes possession of the property without his consent; and this, upon the principle that during the term of lease he is the owner of the property, unless his ownership has been forfeited under the terms of his lease: *Tennessee etc. R. R. Co. v. East Alabama Ry. Co.*, 75 Ala. 524, 51 Am. Rep. 475; 1 *Taylor on Landlord and Tenant*, sec. 172. "An action for an obstruction or disturbance of the enjoyment of an easement may be maintained by any person in possession of the premises to which such easement is appurtenant": 7 *Ency. of Pl. & Pr.* 256.

After entry of a tenant under lease he may bring actions for injuries to his possession, but "the landlord's rights, after the tenant's entry, are confined to the protection of his reversionary interest merely—that is, to the maintenance of actions for such injuries as ⁷⁷ would, in the ordinary course of things, continue to affect such interest after the determination of the lease—whether the injury be committed by a tenant, an under-tenant, or a stranger, and whether the term shall have expired or not. . . . But the injury complained of must be of such a character as permanently to affect the inheritance; and a mere disturbance, if not of a continuous nature, even though done in the assertion of a right, will not entitle the reversioner to an action": 1 *Taylor on Landlord and Tenant*, sec. 173, and authorities there cited; *Hastings v. Livermore*, 7 Gray, 194; *Tinsman v. Belvidere etc. R. R. Co.*, 25 N. J. L. 255, 64 Am. Dec. 415; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406.

The tenant, Burnett & Company, and not the complainant, was the proper party to bring this suit. There is no pretense in the bill that the obstruction of the alleged easement was of injury to complainant's reversion.

The decree below is affirmed.

Implied Easements are Restricted to those which are visible, continuous, and necessary to the enjoyment of the estate granted or retained. A mere convenience is not sufficient to create such an

easement: See *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; monographic note to *Scott v. Moore*, 81 Am. St. Rep. 764, 765.

The Tenant, and not the Landlord, has the right of action for injury to the possession of the demised premises. The landlord's right is confined to the protection of his reversionary interest: *Walden v. Conn*, 84 Ky. 312, 4 Am. St. Rep. 204, 1 S. W. 537; note to *Anderson v. Hapler*, 85 Am. Dec. 323. Consult, in this connection, the monographic note to *Allen v. De Groodt*, 14 Am. St. Rep. 628-639.

BURGESS v. BLAKE.

[128 Ala. 105, 28 South. 963.]

EVIDENCE.—A TRANSCRIPT OF A CONVEYANCE is admissible in evidence only when it appears that the original conveyance has been lost or destroyed or that the party offering the transcript has not the custody or control thereof. (p. 78.)

ALTERATION OF DEED.—A deed, so far as it has operated as a conveyance, is not avoided by alteration. The grantee is not thereby divested of title, and the original instrument is evidence of title and may be used as such. (p. 79.)

Suit by the appellants against the respondents, E. E. Blake and wife, to foreclose a mortgage. The answer admitted the mortgage, but set up that it was made to secure a debt of the husband while it embraced lands of the wife, and hence, as to such lands, was void. To sustain this contention, the defendants introduced, against the objection of the complainants, two deeds conveying different portions of the lands involved to Mrs. Blake. One of these instruments was a certified copy, and the other showed material alterations on its face. A decree of foreclosure was rendered, which excluded from its operation the lands shown by the deeds to belong to Mrs. Blake. From this decree the complainants appealed.

T. M. Stevens, for the appellants.

John R. Tompkins, for the respondents.

108 SHARPE, J. Since the statute in effect inhibits the mortgaging of the wife's property as security for her husband's debt, it will not, in the absence of evidence, be presumed that a mortgage, which on its face appears to have been given as such security, embraces property of the wife, though her joinder therein be in form that of a mortgagor without being

expressly limited to a relinquishment of dower. The burden was on the respondent, Cynthia E. Blake, to prove what land of hers, if any, was included in the mortgage sought to be foreclosed. This she attempted to do by introducing as evidence against complainant's objections a transcript from the record of a deed from Dreisback, purporting to convey to her a part of the land, and a deed from E. E. Blake to another part. The court erred in admitting the transcript. Under section 992 of the code a transcript of a conveyance is admissible in evidence only when "it appears to the court that the original conveyance has been lost or destroyed, or that the party offering the transcript has not the custody or control thereof": *Farrow v. Nashville etc. Ry. Co.*, 109 Ala. 448, 20 South. 303; *Hines v. Chancey*, 47 Ala. 637; *Hendon v. White*, 52 Ala. 597; *Florence etc. Co. v. Warren*, 91 Ala. 533, 9 South. 384.

The original deed of E. E. Blake accompanies the record for our inspection. Excepting an altered part, the entire instrument, including certificate of acknowledgment and signatures of officers and parties, is written in violet ink. In the descriptive clause a purple "W" is overwritten in black ink with the character " $\frac{1}{2}$." Following the "W," a character we read as " $\frac{1}{4}$ " in order to supply sense to the clause as originally written is nearly obliterated with black ink. The effect is to change that which was the "S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ " to "S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$," thus increasing the amount of the land included by forty acres above that which was originally described. Another clause in the original writing specifies the total ¹⁰⁰ number of acres conveyed as "200 32-100," while the aggregate, according to the change, is "240 32-100" acres; and so an inconsistency is created which would most probably have been noticed and corrected had the alteration preceded execution of the deed.

Recognizing the principle as declared in *Sharpe v. Orme*, 61 Ala. 263, that an alteration in a deed will be presumed to have been made prior to its execution, unless it be of a character to excite suspicion that it occurred thereafter, yet we are of the opinion, treating the question as one of fact, that this alteration must, in the absence of explanatory proof, be held to have been made after the deed was executed. Though it may have been made by the grantor for the purpose of conveying the additional forty acres and without fraudulent intent, yet for lack of the attestation of acknowledgment which the statute

makes essential to a conveyance of land, no title to the added forty acres passed.

Unlike writings which evidence executory contracts, a deed, so far as it operates as a conveyance, is not avoided by alteration. Having accomplished transmission of the title, the grantee is not divested of title by alteration of the deed, however its covenants may be affected. The original instrument remains a muniment of title, and with or without explanation is evidence of title, and may be used as such. The question of its admissibility was well decided in *Alabama State Land Co v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440, where conflicting authorities are referred to and discussed. See, also, 2 Am. & Eng. Ency. of Law, 204; *Burnett v. McCluey*, 78 Mo. 676. Objections made to the introduction of the deed were properly overruled, but the court erred in omitting from the decree of foreclosure the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 8, T. 3, R. 3 E., which was embraced in complainants' mortgage, and which, under our construction of the altered deed, had never been conveyed to Mrs. Blake.

The decree will be reversed and the cause remanded.

UNAUTHORIZED ALTERATION OF WRITTEN INSTRUMENTS.

I. General Rule.

- a. Statement of Rule.
- b. Reasons for Rule.
- c. Origin and Growth of Doctrine.

II. Materiality of Alterations.

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 1. General Rule.
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- b. What Alterations are Material.
 1. Test of Materiality.
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 5. Addition or Erasure of Terms Which may be Supplied by Construction.
 6. Change of Name of Grantee or Payee.
 7. Change of Name of Maker or Drawer.
 8. Erasure of Descriptio Personae.
 9. Erasure of Name of Principal Obligor.

10. Erasure of Name of Secondary Obligor.
11. Addition of Parties, Generally.
12. Addition of Maker—Materiality of as to Surety.
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14. Addition of Maker—Materiality of as to Co-maker.
15. Addition of Attesting Witness.
16. Alteration of Negotiability.
17. Alteration of Amount.
18. Alteration of Interest Clause.
19. Alteration of Time of Payment.
20. Alteration of Place of Payment.
21. Alteration of Date.
22. Alteration of Medium of Payment.
23. Addition of Waivers to Indorsement.
24. Alteration of Serial Numbers.
25. Alteration of Memoranda.
26. Alteration of Subject Matter, etc.

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- b. Must be by One not a Stranger to the Instrument.
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 4. Alterations by One Pecuniarily Interested in the Instrument.
 5. Alterations by Thief.
 6. Alterations by Public Officers.
 7. Implied Authority from Maker.
 8. Alterations by Co-obligor.
 9. Implied Authority in Holder to Fill Blanks.
 10. Excess of Implied Authority to Fill Blanks by Addition of Unnecessary Terms, or by Erasures, etc.
 11. Alteration by Agent of Maker in Excess of Express Authority to Fill Blanks.

IV. Time When Made.

- a. Alterations Made Before Execution.
- b. Alterations of Accommodation Paper Before Delivery to Payee.

V. Intent With Which Made.

- a. General Rule.

b. Must be Intent to Alter.

1. Addition of Memoranda, Separate Contracts, etc.

2. Accidental Alterations.

c. Where Made to Correct Mistake or Conform Instrument to Intent of Parties.**VI. Effect of Alteration Upon Rights of Parties.****a. General Rule.****b. Where Instrument is in Duplicate.****c. Where Instrument is Restored to Its Original Condition.****d. Where Negligence of Maker has Facilitated the Alteration.****e. Effect of Bona Fides of Purchaser of Altered Instrument.****f. Effect of Alteration upon Right of Action on Original Consideration.****g. Effect Upon Mortgage of Alteration of Note.****h. Right to Recover Money Paid upon Altered Instrument.****i. Where Instrument was an Executed Contract or Conveyance.**

1. Upon Title Vested Under It.

2. Upon Executory Covenants.

3. Upon Instrument as Evidence of Vested Title or a Collateral Fact.

VII. Ratification of Alteration.**VIII. Province of Court and Jury.****IX. Burden of Proof and Presumptions.****a. Where Alteration is not Apparent.****b. Where Alteration is Apparent.**

1. Presumption as to Time of Alteration.

2. Presumption as to Party Making Alteration.

I. General Rule.

a. Statement of Rule.—The voluminous body of law and of decided cases relating to the effect of the unauthorized alteration of writings is made up entirely of qualifications of, and exceptions to, one general and well-established rule. Briefly stated it is that "any change in a material part of a written instrument, after such instrument has been fully executed by a party to such instrument or one claiming under him, and without the consent of the party sought to be charged, renders such instrument void even in the hands of an innocent holder."

With certain qualifications peculiar to each state, the above rule is now firmly established in all of the states: *Hollis v. Harris*, 96

Ala. 288, 11 South. 377; Lemay v. Williams, 32 Ark. 166; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115; Mater v. American Nat. Bank, 8 Colo. App. 325, 46 Pac. 221; Warpole v. Allison, 4 Houst. 322; Portsmouth Bank v. Wilson, 5 App. Dec. (D. C.) 8; Stewart v. Preston, 1 Fla. 10, 44 Am. Dec. 621; Armstrong v. Penn, 105 Ga. 229, 31 S. E. 158; Gardiner v. Harback, 21 Ill. 129; Hayes v. Wagner, 89 Ill. App. 390; Kingan v. Silvers, 13 Ind. App. 80, 37 N. E. 413; Noll v. Smith, 64 Ind. 511, 31 Am. Rep. 131; Hagan v. Merchants' Ins. Co., 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; Johnson v. Moore, 83 Kan. 90, 5 Pac. 406; Phoenix Ins. Co. v. McKernan, 100 Ky. 97, 37 S. W. 490; Citizens' Nat. Bank v. Richmond, 121 Mass. 110; Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Renville County v. Gray, 61 Minn. 242, 63 N. W. 635; Bay v. Shrader, 50 Miss. 326; Ownigs v. Arnot, 33 Mo. 406; McMillan v. Hefferlin, 18 Mont. 385, 45 Pac. 548; Fisher v. Hutton, 44 Neb. 122, 62 N. W. 488; Brown v. Straw, 6 Neb. 536, 29 Am. Rep. 369; Haines v. Dennet, 11 N. H. 180; Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 406; National Ulster Bank v. Madden, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; Long v. Mason, 84 N. C. 15; Wills v. Wilson, 3 Or. 308; Neff v. Homer, 63 Pa. St. 327, 3 Am. Rep. 555; Plyler v. Elliott, 19 S. C. 257; Landauer v. Implement Co., 10 S. Dak. 205, 72 N. W. 467; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567; Texas etc. Co. v. Smith (Tex.), 14 S. W. 1074; American Publishing Co. v. Fisher, 10 Utah, 147, 37 Pac. 259; Yeager v. Musgrove, 28 W. Va. 90; Angle v. Northwestern Life Ins. Co., 92 U. S. 830; Aldous v. Cornwell, L. R. 3 Q. B. 573.

b. **Reasons for Rule.**—The reasons for the existence of such a rule are obvious, and are well set forth in *Kingan v. Silvers*, 13 Ind. App. 80, 37 N. E. 413, where the court said: "A written instrument in the hands of an adverse party is easily susceptible of alteration to the injury of the maker. Many written contracts are negotiable, and perform important functions in commercial transactions. It is of the highest importance to the commercial world that they be preserved in their original state or condition. Public policy demands this for the prevention of frauds, and of loss to innocent persons. The most effectual means of preserving the integrity of such instruments is the rule that a material alteration destroys the instrument, so that no recovery can be had upon it, either in its original or its altered condition. . . . The object of the rule is to enjoin the highest care upon the holder, and to punish him with loss for his negligent and fraudulent conduct."

c. **Origin and Growth of Doctrine.**—While such are undoubtedly the reasons for the rule as at present applied—i. e., the prevention of fraud and the preservation of that evidence which the parties

have decided upon as the sole evidence of their contract—the rule had its origin in the old doctrine as to profert of deeds. This required that the profert correspond with the deed as declared on—a thing manifestly impossible where there had been a change in the deed itself. And so in Pigot's Case, where the rule is first definitely stated (6 Reports, pt. XI, p. 27, 1614), it was resolved: "That when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through the midst of any material word, that the deed thereby becomes void. . . . So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed in any of the said ways in any point not material, it shall not avoid the deed."

The doctrine of Pigot's Case was at first applicable only to deeds, but was extended in *Masters v. Miller*, 4 T. R. 820, 1 Smith's Leading Cases, 796, to bills of exchange, and was finally held to apply to all written contracts indiscriminately, in *Davidson v. Cooper*, 11 Mees. & W. 778, 13 Mees. & W. 343.

But the doctrine, while it has been extended to cover instruments other than those contemplated when it was first enunciated, has been materially restricted as to the alterations sufficient to vitiate the instrument. And while it is perhaps true, as was said by Lord Denman in *Davidson v. Cooper*, 13 Mees. & W. 343, that "to say that Pigot's Case has been overruled is a mistake, on the contrary it has been extended," it is none the less true that in at least two particulars, the old rule has now been almost universally overruled, and the more modern and more sensible rule established that alterations by a stranger to the instrument are of no effect; and that only material alterations by a party to the instrument can have the effect of vitiating it: *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299; *Hunt v. Gray*, 85 N. J. L. 227, 10 Am. Rep. 232.

II. Materiality of Alterations.

a. Must be Material.

1. **General Rule.**—Whatever may have been the older doctrine, it is now the settled law in all but two of the states, and is certainly the law in England, that no alteration vitiates an instrument unless it is material. The states of Missouri and New Jersey, however, still adhere to the old doctrine in all its rigor, and in those states any alteration, however immaterial, is held to avoid the instrument altered. The general rule is supported by almost innumerable decisions: *Winter v. Pool*, 100 Ala. 503, 14 South. 411; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 8 S. W.

892; *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Thackaray v. Hanson*, 1 Colo. 365; *Nichols v. Johnson*, 10 Conn. 192; *Warder etc. Co. v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. 88; *Lewis v. Shepherd*, 1 Mackey (D. C.), 46; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201, 1 South. 140; *Steinau v. Moody*, 100 Ga. 136, 28 S. E. 30; *Magees v. Dunlap*, 39 Ill. App. 618; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Casto v. Evinger*, 17 Ind. App. 298, 46 N. E. 648; *Davis v. Campbell*, 93 Iowa, 524, 61 N. W. 1053; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022; *Terry v. Hazlewood*, 62 Ky. 104; *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293; *Mitchell v. Ringgold*, 3 Har. & J. 159, 5 Am. Dec. 433; *Brown v. Pinkham*, 18 Pick. 172; *Prudden v. Nester*, 103 Mich. 540, 61 N. W. 777; *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161; *McRaven v. Crisler*, 53 Miss. 542; *Fisherdict v. Hutton*, 44 Neb. 122, 62 N. W. 488; *Young v. Currier*, 63 N. H. 419; *Flint v. Craig*, 59 Barb. 319; *Cheek v. Nall*, 112 N. C. 370, 17 S. E. 80; *Sturgis v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473; *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. 270, *Wills v. Wilson*, 3 Or. 308; *Miller v. Gilleland*, 19 Pa. St. 119; *Craighead v. McLoney*, 99 Pa. St. 211; *Manufacturers' etc. Bank v. Follet*, 11 R. I. 92, 23 Am. Rep. 418; *Pepoon v. Stagg*, 1 Nott & McC. 103. *Noteholders' Tenn. Bank v. Funding Board*, 84 Tenn. 46, 57 Am. Rep. 211; *Tutt v. Thornton*, 57 Tex. 35; *McClure v. Little*, 15 Utah, 379, 62 Am. St. Rep. 938, 49 Pac. 298; *Langdon v. Paul*, 20 Vt. 217; *Newel v. Mayberry*, 3 Leigh, 250, 23 Am. Dec. 261; *Deem v. Phillips*, 5 W. Va. 168; *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241; *Wood v. Steele*, 6 Wall. 80; *Aldous v. Cornwell*, L. R. 3 Q. B. 573.

Many of the earlier cases in some of the states sought to hold rigidly to the older doctrine, but have been either expressly overruled or have not been followed. Such are *Bank of Commonwealth v. McChord*, 4 Dana, 191, 29 Am. Dec. 398; *Bank of Limestone v. Penick*, 2 T. B. Mon. 98, 15 Am. Dec. 136; *Taylor v. Johnson*, 17 Ga. 521; *Reed v. Kemp*, 16 Ill. 445; *Barrett v. Thorndike*, 1 Me. 73; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427.

2. *Doctrine of Missouri and New Jersey Courts.*—As before noted, however, two states have clung tenaciously to the doctrine that any alteration, however immaterial, vitiates the instrument altered. The rule in Missouri was first firmly established by *Haskell v. Champion*, 30 Mo. 136, where the court, speaking through Scott, J., said: "The law, in dealing with the subject of alteration of written instruments, looks further than to the materiality or immateriality of the alteration. Aware of the danger of countenancing the most trifling change, it has not permitted those intrusted with such instruments to alter them and afterward defend their conduct by alleging the immateriality of the altera-

tion." And the court in the recent case of *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300, reasserting the doctrine of the leading case (*Haskell v. Champion*, 30 Mo. 136), says: "By thus holding we intend to make the payees or obligees of money bearing or title bearing obligations honest, whether that disposition accords with their natural inclinations or not": See *Evans v. Foreman*, 60 Mo. 449; *German Bank v. Dunn*, 62 Mo. 79; *Moore v. Hutchinson*, 69 Mo. 429; *Burnham v. Gosnell*, 47 Mo. App. 637; *First Nat. Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397.

And the doctrine is equally well established in New Jersey. In *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232 (a leading case in New Jersey, and indeed upon the subject of alteration of instruments generally), the court remarks: "Even immaterial alterations are fatal, as the rule, to be efficacious, cannot permit a person to tamper in any degree with the written contract of another in his possession": See, also, *Jones v. Crawley*, 57 N. J. L. 222, 30 Atl. 871; *Wright v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Price v. Tallman*, 1 N. J. L. 447; *Den v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Vanauken v. Hornbeck*, 14 N. J. L. 178, 25 Am. Dec. 509.

b. What Alterations are Material.

1. **Test of Materiality.**—But the difficulty which arises with reference to the materiality of alterations is due not to any lack of harmony among the authorities as to the necessity that the alteration be material. As above stated, it is the almost universal rule (Missouri and New Jersey alone excepted) that an immaterial alteration is of no effect. The difficulty lies rather in ascertaining what alterations are material and what are not.

Theoretically, the test is simple. That is a material alteration which makes the instrument speak a language different in legal effect from that which it originally spoke, which carries with it some change in the rights, interests, or obligations of the parties to the writing: *Payne v. Long*, 121 Ala. 385, 25 South. 780; *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. 244; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Iowa Valley St. Bank v. Sigstad*, 96 Iowa, 491, 65 N. W. 407; *Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545; *Wheelock v. Freeman*, 13 Pick. 165, 23 Am. Dec. 674; *Kinney v. Schmitt*, 12 Hun, 521; *Sturges v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473; *Craighead v. McLoney*, 99 Pa. St. 211; *Organ v. Allison*, 9 Baxt. 459. And while certain cases propose, as a test, the determination of "whether or not the identity of the contract has been changed," this, it is submitted, is in reality no test at all. For used in the strictest sense, the identity of an instrument with another is lost by any change, however slight—as the erasure of serial numbers, for instance. And if this be not the sense in which it is to be employed, the test amounts to no more than the rule that that is a material alteration which materially changes the

identity of the contract, a test of doubtful practical value: See, however, for cases suggesting this, *Struthers v. Kendall*, 41 Pa. St. 214, 80 Am. Dec. 610; *Cambridge Savings Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193.

2. **Actual Injury from Alteration Unnecessary.**—The true test of materiality, then, being whether or not the instrument speaks a different language in legal effect, it is of no importance whether, as a matter of fact, the alteration has changed the situation of the parties. "That is material which might become material," and any alteration which may in any event alter the rights, duties, or obligations of the party sought to be charged is material in the legal sense: *Soaps v. Eichberg*, 42 Ill. App. 375; *Booth v. Powers*, 56 N. Y. 22; *Townsend v. Star Wagon Co.*, 10 Neb. 615, 35 Am. Rep. 493, 7 N. W. 274.

3. **Question of Possible Benefit or Injury Immaterial.**—And it is equally unimportant whether the alteration was beneficial or injurious to the party whom it is sought to charge on the instrument. The question is not whether the party has been, or could be, injuriously affected, but is whether or not his rights have been materially affected—whether the contract in its altered condition is the contract into which he entered. If it is not, he may well say, "*Non haec in foedera veni*," and the question of whether or not the altered contract is more beneficial than the other is not a matter for judicial determination. It is not the party's contract. And with the exception of two ill-considered cases (*Burkholder v. Lapp*, 31 Pa. St. 322, and *Major v. Hansen*, 2 Biss. 195, Fed. Cas. No. 8982), the authorities are unanimous in holding the question of benefit or injury immaterial: *Inglish v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Anderson v. Bellinger*, 87 Ala. 334, 13 Am. St. Rep. 46, 6 South. 62; *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *Taylor v. Johnson*, 17 Ga. 521; *Weir Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232; *Bowers v. Briggs*, 20 Ind. 139; *Johnston v. May*, 76 Ind. 293; *McCormick H. M. Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. 577; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 37 S. W. 490; *People v. Brown*, 2 Doug. (Mich.) 9; *Townsend v. Star Wagon Co.*, 10 Neb. 615, 35 Am. Rep. 493, 7 N. W. 274; *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567; *Organ v. Allison*, 9 Baxt. 459; *Miller v. Stewart*, Fed. Cas. No. 9591, 4 Wash. C. C. 26; affirmed, 9 Wheat. 681; *Gardener v. Walsh*, 5 El. & B. 89.

4. **Addition or Erasure of Terms Supplied by Law.**—Inasmuch as the alteration must change the rights or obligations of the parties to the instrument in order to have a vitiating effect, it has been repeatedly held, and is the undoubted law, that an alteration which merely incorporates into a contract terms which the law would otherwise supply is an immaterial alteration. So an inser-

tion of the legal rate of interest in a note which would otherwise bear it has been held an immaterial alteration: *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *James v. Dalbey*, 107 Iowa, 463, 78 N. W. 51; or the erasure of "with grace" from a note by law entitled to grace: *Portsmouth Sav. Bank v. Watson*, 5 App. Dec. (D. C. 8. or any other terms which the law implies: *Fisherdlck v. Hutton*, 44 Neb. 122, 62 N. W. 488; *Brown v. Pinkham*, 18 Pick. 172; *Harris v. State*, 54 Ind. 2.

5. **Addition or Erasure of Terms Which may be Supplied by Construction.**—And, on the same principle, the insertion, substitution, or erasure of terms which the court would supply by construction is deemed immaterial. Thus, where in a deed the court would, under established rules of construction, be able to say that certain land was in Illinois, it was held an immaterial alteration to strike out "Vermont" and insert "Illinois": *Sanitary Dist. v. Allen*, 178 Ill. 330, 53 N. E. 109. So where "year" was added to the phrase "in the of our Lord 1805," it was held immaterial, as the word would have been supplied by construction. In this case the court, through Parsons, C. J., said: "It would be unworthy the wisdom of the law to decide that an incautious interlineation of a word, which the same law would necessarily imply, should defeat the contract": *Hunt v. Adams*, 6 Mass. 519. See to same effect, *Briscoe v. Reynolds*, 51 Iowa, 673, 2 N. W. 529; *Miller v. Reed*, 27 Pa. St. 244, 67 Am. Dec. 459; *Burnham v. Ayer*, 35 N. H. 351.

6. **Change of Name of Grantee or Payee.**—The alteration of the name of the grantee in a deed is a material alteration: *Hollis v. Harris*, 96 Ala. 288, 11 South. 377; *Abbott v. Abbott*, 189 Ill. 488, 82 Am. St. Rep. 470, 59 N. E. 958; *Simpkins v. Windsor*, 21 Or. 392, 28 Pac. 72. Such alteration has the effect of making the deed an entirely different instrument in legal effect than that which the grantor executed and delivered, and so is uniformly held material. A fortiori, the party whose name is substituted cannot maintain a claim to the land conveyed.

So the alteration of the name of the payee of a promissory note or bill of exchange is held material. It has the effect of making an entirely new instrument, and would render the maker or acceptor liable to a party with whom he never contracted. Under any test possible it is a material alteration, and greatly affects the rights and obligations of the parties; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331; *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. 123; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022; *Dolbier v. Norton*, 17 Me. 307; *Stoddard v. Penniman*, 108 Mass. 366, 11 Am. Rep. 363; *German Bank v. Dunn*, 62 Mo. 79; *Erickson v. First Nat. Bank*, 44 Neb. 622, 48 Am. St. Rep. 753, 62 N. W.

1078; *Davis v. Bauer*, 41 Ohio St. 257; *Sneed v. Sabinal etc. Co.*, 71 Fed. 493, 18 C. C. A. 213.

And it is a material alteration to add a payee, quite as much as to change the name of the payee originally named: *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536; *Park v. Glover*, 23 Tex. 469.

7. **Change of Name of Maker or Drawer.**—It is, of course, a material change to alter the name of a maker of a note or drawer of a bill of exchange. These cases arise most frequently where a party has signed in a representative capacity and the words indicating this are afterward erased. In such case, or in the similar case of the addition of words showing a representative capacity where none was originally intended, the instrument is obviously as completely altered as though the name of the original maker had been struck out and that of an entirely new party inserted: *Sheridan v. Carpenter*, 61 Me. 93; *Sharpe v. Bellis*, 61 Pa. St. 69, 100 Am. Dec. 618; *Texas etc. Co. v. Smith (Tex.)*, 14 S. W. 1074; *North v. Henneberry*, 44 Wis. 306. And in a similar case, *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498, where "and Co." was added to the name of the maker, it was held a material alteration, even though there was in fact no such firm, or though it would not be bound, the court there saying: "It can make no difference that the parties, the addition of whose names constitutes the alteration, are not in fact bound by the instrument. On the face of it they are bound. On its face, therefore, the contract is not identical with the original." And such was the holding in *Haskell v. Champion*, 30 Mo. 136, although it was there held of no consequence whether the alteration was material or not, as under the Missouri doctrine all alterations vitiate the instrument.

8. **Erasure of Descriptio Personae.**—Where, however, the words following the name of the maker are mere descriptio personae, even though he may have intended to sign only in a representative capacity, the addition or erasure of such words produces no change in the legal effect of the instrument, and such alterations are therefore held to be immaterial: *Thackaray v. Hanson*, 1 Colo. 365; *Coit v. Starkweather*, 8 Conn. 289; *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *Casto v. Evinger*, 17 Ind. App. 298, 46 N. E. 648; *Manufacturers' Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418.

In some cases words which are mere descriptio personae, so far as attaching liability to a principal is concerned, have a certain effect as evidence of the capacity in which the party signed, and so may be very material portions of the instrument. Thus, in *Laub v. Paine*, 46 Iowa, 550, 26 Am. Rep. 163, where a party signed "surety" after his name, and the payee erased it, the court held the

erasure a material alteration, disapproving of *Humphreys v. Crane*, 5 Cal. 173. and said: "By the erasure of the word 'surety' after Paine's name, he became liable to be subjected to the necessity of showing by parol, as between him and the principal, what his true relation to the instrument was, whereas, before the alteration, it appeared upon its face. Nor is this a trifling matter. The evidence when wanted might not be obtainable." This would seem to be the true rule, and is in line with the weight of authority as to what constitutes a material alteration. A similar case is that of *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. 123, where the addition of "cashier" after an individual's name was held a material alteration, on the ground that such addition was not mere *descriptio personae*, but enabled the bank to sue in its own name.

9. **Erasure of Name of Principal Obligor.**—But the alteration may, and frequently does, take the form of an erasure, rather than a substitution or change of the name of an obligor. And upon the same principle that governs the latter case, it is held that the erasure of the name of one of several obligors is a material alteration, and discharges the others from liability upon the instrument: *State v. Polke*, 7 Blackf. 27. In *McCramer v. Thompson*, 21 Iowa, 244, it is said that the erasure of the name of one of several principal obligors would not discharge the other obligors entirely, but only *pro tanto*. This, it is submitted, is an erroneous view. A material alteration, by a party thereto, vitiates the instrument altered, and precludes any recovery upon it: *State v. Findley*, 101 Mo. 368, 14 S. W. 111.

10. **Erasure of Name of Secondary Obligor.**—But the more frequent case is that of the erasure of the names of those secondarily liable—sureties and guarantors. And such cases must be considered with reference to the effect of the alteration upon two sets of obligors: 1. The principal debtor; 2. Those who have signed as cosureties with the surety whose name is erased.

First, then, with reference to its effect upon the principal obligor, it may be said that the erasure of the name of a surety is not a material alteration discharging the principal. And the reason for this is well set forth by the court in *Broughton v. West*, 8 Ga. 248, where it is said: "The payee can, if he will, release any party. He does it, of course, at his peril. He having done so, he has no right to complain; and if such release does not affect the rights of other parties, they cannot complain. In this case the parties to the note are the maker and his sureties, being joint and several promisors and the payee. There is no contract between the principal and surety, which is affected by the release of the surety. The principal is bound at all events, whether the name of the surety is taken off or not. The note, with the surety's name

upon it, is joint and several, upon which, both are together liable to suit, or each singly. With the surety's name taken off, the principal stands liable as before. He had no rights as against his surety, whilst his name was on the paper, any more than he now has, and his contract with the payee remains precisely the same." And see to the same effect, *Montgomery R. R. Co. v. Hurst*, 9 Ala. 513; *Graham v. Rush*, 73 Iowa, 451, 35 N. W. 518; *Union Banking Co. v. Martin*, 113 Mich. 521, 71 N. W. 867; *Gano v. Heath*, 36 Mich. 441; *Miller v. Finlèy*, 26 Mich. 249, 12 Am. Rep. 306; *Barnes v. Van Keuren*, 31 Neb. 165, 47 N. W. 848; *Stone v. White*, 8 Gray, 589; *Green v. Shepherd*, 5 Allen, 589; *Royse v. State Nat. Bank*, 50 Neb. 16, 69 N. W. 301; *Partridge v. Colby*, 19 Barb. 248; *McCaughey v. Smith*, 27 N. Y. 39; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314; *Ford v. First Nat. Bank (Tex.)*, 34 S. W. 684; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 131, 97 Fed. 896, overruling S. C., 87 Fed. 271; *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. Rep. 65; *Cotton v. Simpson*, 8 Ad. & E. 136; *Ex parte Yates*, 2 De Gex & J. 191. But the erasure of the name of the principal obligor is of course an alteration discharging the surety: *Hall v. McHenry*, 19 Iowa, 521, 87 Am. Dec. 451.

Second. As to the effect of the erasure of the name of one surety upon the liability of his cosureties, the rule is well established that such alteration is material and discharges all cosureties who signed prior to such alteration and did not consent thereto: *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *State v. Polke*, 7 Blackf. 27; *McCramer v. Thompson*, 21 Iowa, 244; *State v. Craig*, 58 Iowa, 238, 12 N. W. 301; *Boston v. Benson*, 12 Cush. 61; *Howe v. Peabody*, 2 Gray, 556; *Love v. Shoape*, Walk. Ch. 508; *Briggs v. Glenn*, 7 Mo. 572; *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692; *Smith v. United States*, 2 Wall. 219; *Dair v. United States*, 16 Wall. 1; *Martin v. Thomas*, 24 How. 315; *United States v. O'Neill*, 19 Fed. 567. The case of *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880, stretched this rule to the extent of discharging a surety who signed after the erasure, but in his official capacity as governor of the state, and with knowledge of the erasure. But the validity of this holding was very properly doubted in *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692, and can hardly be considered sound law.

11. **Addition of Parties, Generally.**—Upon the question of whether or not an instrument is materially altered by the addition of new obligors, there is much confusion and conflict among the authorities. The cases, however, fall very naturally into three classes, and will be so treated. The question, then, whether or not such addition is material is different in the following classes of cases: 1. When the change is the addition of a new maker, and its effect upon a prior nonconsenting surety is involved; 2. Where

the addition is that of a new surety and its effect upon the other sureties is concerned; and finally, 3. Where the effect of the addition of a new maker upon the other original maker is involved.

12. Addition of Maker—Materiality of as to Surety.—Where a new maker is added after the sureties have signed, it is quite uniformly held that such addition is a material alteration, and discharges such of the sureties as have not consented to the alteration. The surety is a favorite in the law, and, were he not, the consequences of the addition of a name to that of the obligor originally on the note might well be great. Were the surety compelled to pay the amount of the note, his right to indemnity at the hands of the principal obligors would then have to be prosecuted against two or more, the jurisdiction might be changed by the addition of such new obligor, and consequences even more serious might result. Such a change, therefore, is held to vitiate the instrument as to all sureties who signed before the addition, and who have not since consented to or ratified it: *Taylor v. Johnson*, 17 Ga. 521; *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594; *O'Neale v. Long*, 4 Cranch, 60; *Haskell v. Champion*, 36 Mo. 136.

13. Addition of Surety—Materiality of as to Cosurety.—Whether or not the addition of new sureties is a material alteration discharging the other sureties is a question concerning which the authorities are by no means in harmony. Much of this confusion has arisen from a failure to distinguish between those cases in which the additional maker signed as an original promisor and those in which he signed merely as a surety. As a result there is a large class of cases in which it does not appear in what capacity the new party signed—whether as promisor or surety—and whether, if he signed as surety, his relationship to the principal was known to the payee.

It seems, however, to be fairly well settled that where a new party signs as surety after delivery of the instrument to the payee, the prior nonconsenting sureties are discharged: *Berryman v. Mauker*, 56 Iowa, 150, 9 N. W. 103; *Dickerman v. Miner*, 43 Iowa, 508; *Hall v. McHenry*, 19 Iowa, 522, 87 Am. Dec. 451, and cases there cited; *Parsons on Notes and Bills*, 556.

"But," says the court in this last case (*Hall v. McHenry*, 19 Iowa, 522, 87 Am. Dec. 451), "these cases and authorities, so far as we have been able to examine them, treat of the doctrine as applied to a note fully issued and delivered, and when the name is afterward obtained, at the instance of the payee, or with his knowledge or consent, without the consent of the original maker or makers." And after discussing whether or not the addition of a new maker before execution would discharge a comaker, the court proceeds to say: "Yet we unite in the opinion that the subsequent act of the payee, in cutting off the name of Lyon, without the

knowledge of the other surety, had the effect of so altering the note as to discharge defendant. This amounted to a spoliation of the instrument, or so affected its integrity, by the act of the payee, as that he should not be allowed to claim any advantage from it as against the other surety." And this was followed in the subsequent cases of *Dickerman v. Miner*, 43 Iowa, 508; *Hamilton v. Hooper*, 46 Iowa, 515, 26 Am. Rep. 161, *Berryman v. Manker*, 56 Iowa, 150, 9 N. W. 103. The language above quoted is, however, said in *Ward v. Hackett*, 30 Minn. 150, 44 Am. Rep. 187, 14 N. W. 578, to be "dicta which go further than any decision we have found." And this case takes a diametrically opposite view, using the following language: "The position of appellant is that the fact of Hackett's obtaining the name of another surety upon the note, without his knowledge or consent, although done before the note was delivered to the plaintiff, amounted to a material alteration of the instrument, which discharged him, even though plaintiff had no notice of the facts when he took the note. If this be the law, we are satisfied its announcement would be a surprise to the business and commercial world. It would render commercial paper a very uncertain and unsafe subject with which to deal. . . . We have been referred to no case, and have found none, going so far as to hold, where a surety signs a promissory note and intrusts it to his principal, and the principal, while the instrument is still inchoate and has not become effectual as contract by delivery, procures an additional signer, that this would be a material alteration and release the first surety." And the court holds this to be the rule on authority, "even if the payee knew, when he took the note, the circumstances under which the additional signature was obtained." And this case was followed in *Tarbill v. Richmond City Mill Works*, 2 Ohio C. C. 564.

With authority so divided it becomes pertinent to inquire for the true principle, and this would seem to be that procuring such additional surety should operate as a material alteration and discharge the prior nonconsenting sureties, whether or not the payee knew of the circumstances under which the additional signature was obtained. The principles which determine this case should be those applicable to any other case of alteration of instruments. That the addition of another surety affects the rights and obligations of those sureties already upon the paper is not to be doubted. It affects their right to contribution by affecting the rates of contribution; it renders possible a change of jurisdiction, and in many ways might greatly alter their position. That the principal is in such case not the agent of the surety to alter the instrument is by the weight of authority equally certain. It cannot be claimed that the principal is a stranger to the instrument. The good faith of the payee is no more important here than in any other case of an altered instrument, where it is uniformly held

to be of no avail as a defense. Nor are the considerations suggested in *Ward v. Hackett*, 30 Minn. 150, 44 Am. Rep. 187, 14 N. W. 578, an answer. The rule of *Hall v. McHenry*, 19 Iowa, 522, 87 Am. Dec. 451, makes commercial paper no more "an uncertain and unsafe subject with which to deal" than does any other case holding an alteration to be material and vitiating in spite of the good faith and lack of knowledge of the purchaser. Although, therefore, the authorities would seem to be equally divided, the rule of *Hall v. McHenry*, 19 Iowa, 522, 87 Am. Dec. 451, seems, on principle, to be preferable.

14. Addition of Maker—Materiality of as to Comaker.—Both in England and in this country, with the exception of the decisions in the state of New York, the rule is now well established that the addition of a new maker discharges all prior nonconsenting makers: *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Rhoades v. Leach*, 93 Iowa, 337, 57 Am. St. Rep. 281, 61 N. W. 988; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. 856; *Hamilton v. Hooper*, 40 Iowa, 515, 26 Am. Rep. 161; *Hall v. McHenry*, 19 Iowa, 521, 87 Am. Dec. 451; *Shipp v. Suggett*, 48 Ky. 5; *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652; *Lunt v. Silver*, 5 Mo. App. 186; *Farmers' Nat. Bank v. Myers*, 50 Mo. App. 157; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Ford v. First Nat. Bank (Tex.)*, 34 S. W. 684; *O'Neale v. Long*, 4 Cranch, 60; *Gardner v. Walsh*, 5 El. & B. 83, 32 Eng. L. & Eq. 162, overruling *Cotton v. Simpson*, 8 Ad. & E. 136.

The New York decisions as to this point are confused and confusing. *Chappell v. Spencer*, 23 Barb. 584, citing English cases to sustain its position, held the addition of a new maker a material alteration. And such was the holding in *McVean v. Scott*, 46 Barb. 379, which undertook to defend the case of *Chappell v. Spencer*, 23 Barb. 584, from the attacks upon it in *McCaughy v. Smith*, 27 N. Y. 89, and *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314, both of which held the addition of a new maker in a several note immaterial. But *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314, made a distinction between the addition of a maker in a joint or joint and several note, and the case where the note is several. With the law in this confused state the case of *Card v. Miller*, 1 Hun, 504, was decided. There the note sued on was a several note, and the court held itself unable to say in the face of two decisions by the court of appeals that the alteration was material. And such would now seem to be the law of New York, though it is certainly opposed to the weight of authority elsewhere.

15. Addition of Attesting Witness.—Closely connected with the effects of an unauthorized erasure of, addition to, or change of the names of the parties to an instrument is that of the effect of an unauthorized attestation. In *Fuller v. Green*, 64 Wis. 159, 64 Am. Rep. 600, 24 N. W. 907, it was held that such alteration

was immaterial in states which, like Wisconsin, recognize no distinction between those instruments which are attested and those which are not. The court here makes a distinction, certainly valid, between the effect of such an alteration in a state where this state of law prevails, and those in which, as in Massachusetts and Maine, the liability of the maker of an attested note is recognized as different (whether with reference to the statute of limitations or in some other connection) from that of a maker of an unattested instrument: See, also, *State v. Gherkin*, 26 N. C. 206, where it was held that adding the name of a witness to an instrument which does not by law require a witness is an immaterial alteration. But where, though a witness is not necessary, an attested writing is regarded as different from an unattested writing for any purpose, it is a material alteration to add an attestation. In both Maine and Massachusetts the peculiar rule prevails that the addition of an attestation by a witness who did not see the maker sign is material, while if he saw the maker sign and the attestation was affixed for an honest purpose, the alteration is immaterial: *Eddy v. Bond*, 19 Me. 461, 36 Am. Dec. 767; *Thornton v. Appleton*, 29 Me. 298; *Brackett v. Mountfort*, 11 Me. 115; *Milbery v. Storer*, 75 Me. 69, 46 Am. Rep. 361; *Smith v. Dunham*, 8 Pick. 246; *Ford v. Ford*, 17 Pick. 418; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Blackwell v. Lane*, 4 Dev. & B. 113, 32 Am. Dec. 675; *Marshall v. Gougler*, 10 Serg. & R. 164. In *Ford v. Ford*, 17 Pick. 418, the addition of the signature of an attesting witness was held immaterial where one witness had already signed, the court saying: "The note in this case was not affected at all by the putting the name of a second subscribing witness. One would be as good as two or twenty."

16. *Alteration of Negotiability.*—Any alteration which has the effect of altering the negotiability of a writing is, by the overwhelming weight of authority, a material and vitiating alteration. Thus, the addition of "or order" or "bearer" to a note or the substitution of one phrase for the other, is material, and avoids the instrument altered: *McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 68; *Scott v. Walker*, Dud. (Ga.) 243; *Needles v. Shaffer*, 60 Iowa, 65, 14 N. W. 129; *Crosswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 52 N. W. 883; *Haines v. Dennett*, 11 N. H. 180; *Bruce v. Westcott*, 3 Barb. 374; *Booth v. Powers*, 56 N. Y. 22; *Marshall v. Wilhite* (Ohio), 2 O. C. D. 500; *Frey v. Wessner*, 1 Woodw. Dec. (Pa.), 145; *Pepoon v. Stagg*, 1 Nott & McO. 103; *Taylor v. Moore*. Contra, see *Weaver v. Bromley*, 65 Mich. 212, 31 N. W. 839; *Flint v. Craig*, 59 Barb. 319; *Carlile v. Lamb*, 16 Ohio C. C. 578. And on the same principle, it is held in those states in which negotiability is made to depend upon the certainty of the place of payment that any change which makes such place of payment more

or less certain, and so renders the note or bill of exchange negotiable or non-negotiable, is a material alteration: *Winter v. Pool*, 100 Ala. 503, 14 South. 411; *Gillasple v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Morehead v. Parkersburgh Nat. Bank*, 5 W. Va. 74, 13 Am. Rep. 636. Likewise, where detaching a condition from a note renders it negotiable, it is a material alteration, and discharges all parties from liability on the instrument: *State v. Stratton*, 27 Iowa, 420, 1 Am. Rep. 282. Conversely, where a note is subject to the conditions of a mortgage, it is non-negotiable, and the insertion of the words "or bearer" is a vain act and an immaterial alteration: *Goodenow v. Curtis*, 33 Mich. 505.

17. **Alteration of Amount.**—It is, of course, a material alteration to alter the amount of the principal sum in any writing which is evidence of a promise to pay that sum. Thus, an alteration of the penal sum in a bond, or of the amount of a note or bill of exchange, etc., is held to avoid the instrument so altered: *Green v. Sneed*, 101 Ala. 205, 46 Am. St. Rep. 119, 13 South. 277; *People v. Kneeland*, 31 Cal. 828; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 491; *Woolfolk v. Bank of America*, 10 Bush, 504; *Dunbar v. Armor*, 5 Rob. (La.) 1, 39 Am. Dec. 528; *Hewins v. Cargill*, 67 Me. 554; *Dover v. Robinson*, 64 Me. 183; *Howe v. Peabody*, 2 Gray, 556; *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52; *People v. Bown*, 2 Doug. (Mich.) 9; *Ruby v. Talbot*, 5 N. Mex. 251, 21 Pac. 72; *Portage etc. Bank v. Lane*, 8 Ohio St. 405; *Stephens v. Graham*, 7 Serg. & R. 505, 10 Am. Dec. 485; *Batchelder v. White*, 80 Va. 103. And here, as in other cases, it is of no consequence whether the sum be lessened or increased, The fact of alteration and not the mode is deemed important, and the question of benefit or injury can play no legitimate part.

18. **Alteration of Interest Clause.**—It is uniformly held that any alteration of the clause referring to interest in written obligations for the payment of money is a material alteration. Thus, to add an interest clause to paper which would otherwise bear no interest is an alteration which discharges from all liability on the paper all prior parties who did not consent to the alteration: *Lamar v. Brown*, 56 Ala. 157; *Brown v. Jones*, 3 Port. 420; *Glover v. Robbins*, 49 Ala. 219, 20 Am. Rep. 272; *Warpole v. Allison*, 4 Houst. 322; *Brock v. Brock*, 29 Ill. App. 334; *Kountz v. Hart*, 17 Ind. 329; *Hart v. Clauser*, 30 Ind. 210; *Waterman v. Vose*, 43 Me. 504; *Fay v. Smith*, 1 Allen, 477, 79 Am. Dec. 752; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Swarz v. Oppold*, 74 N. Y. 307; *Wyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Long v. Mason*, 84 N. C. 15; *Gettysburgh Nat. Bank v. Chisholm*, 169 Pa. St. 564, 47 Am. St. Rep. 929, 32 Atl.

730. And any change in the rate of interest by an alteration of the interest clause as originally written is deemed a material alteration, and vitiates the instrument altered: *Lewis v. Shepherd*, 1 Mackey (D. C.), 46; *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984; *Bowman v. Mitchell*, 79 Ind. 84; *Lee v. Starbird*, 55 Me. 491; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523; *Ruby v. Talbott*, 5 N. Mex. 251, 21 Pac. 72; *Thompson v. Massie*, 41 Ohio St. 307; *Harsh v. Klepper*, 28 Ohio St. 200; *Dobyns v. Rowley*, 76 Va. 537. And any change whereby the time from which interest begins to accrue is altered, as by a change of the words "from maturity" to "from date," is held to materially affect the contract of the parties, and discharges them from liability on the instrument: *Kingan v. Silvers*, 13 Ind. App. 80, 37 N. E. 413; *Sheley v. Sampson*, 5 Kan. App. 465, 46 Pac. 994; *Mattingly v. Riley*, 20 Ky. Law Rep. 1621, 49 S. W. 799; *Otto v. Half*, 89 Tex. 384, 59 Am. St. Rep. 56, 34 S. W. 910. Likewise any alteration by which the time at which payments of interest are to be made is changed is material and avoids the instrument. Thus, where an instrument contained the phrase "above to be at ten per cent interest annually," it was held that this was synonymous with "at ten per cent per annum," and hence that the insertion of the word "paid" before "annually" required the interest to be paid annually, an act before not required by the instrument. Such insertion was therefore held to materially alter the instrument: *Patterson v. McNeeley*, 16 Ohio St. 348. And to change "annually" in an interest clause to "quarterly": *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467; or to add such a phrase as "interest to become principal if not paid annually," as was done in *Kennedy v. Moore*, 17 S. C. 464, are material changes, affecting the time at which the interest is to be paid, and are held to vitiate the instruments so altered.

19. **Alteration of Time of Payment.**—In conformity with the general rule it is well established that any change in the time of payment of the note, whether such change hastens or postpones its maturity, is a material alteration: *Steinau v. Moody*, 100 Ga. 136, 28 S. E. 30; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; *Lisle v. Rogers*, 57 Ky. 528; *Wheelock v. Freeman*, 13 Pick. 165, 23 Am. Dec. 674; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113. Where, however, though apparently an alteration of the time of payment, it is not in fact so, the change is, of course, immaterial. Thus in *Bingham v. Reddy*, 5 Ben. 266, Fed. Cas. No. 1414, a note "payable — after date" was altered by striking out "after date" and substituting "on demand." This was, however, held an immaterial alteration, the court basing its decision upon the fact that the holder, having implied authority to fill all blanks, could by filling the blank before "after date" with "one day" and antedating the note one day, have made it payable on the very day of its negoti-

ation, or for all practical purposes "on demand." In *Drexler v. Smith*, 30 Fed. 754, an indorsement by the payee extending the maturity one year was held immaterial, since by the provisions of the note the maker might pay "on or before" that time. And upon the same principle it was held in *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161, that an accommodation indorser was not discharged by an alteration permitting the maker to pay the note before maturity at his election. The court there says, speaking through Berry, J.: "His [indorser's] rights are, at the maturity of the note, to have the same duly presented to the maker, payment of the same duly demanded, and in case of nonpayment, to receive due notice thereof; and if he is himself compelled to pay the note, he has a right of recourse against the maker. His obligation is to pay the note if, upon proper presentation and demand, the same is not paid by the maker and notice of nonpayment is duly given to himself. It is hardly necessary to say that these rights and obligations are not in any way affected by the so-called alteration, and we are, therefore, of opinion that it cannot be held to be material."

20. **Alteration of Place of Payment.**—Perhaps as well settled as any one principle in the law of the alteration of writings is that which holds any alteration of the place of payment a material alteration discharging the parties to the writing (who did not consent to the change) from any liability thereon: *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Pelton v. San Jacinto etc. Co.*, 113 Cal. 21, 45 Pac. 12; *Sudler v. Collins*, 2 Houst. 538; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; *Whitesides v. Northern Bank of Kentucky*, 10 Bush, 501, 19 Am. Rep. 74; *Nazro v. Fuller*, 24 Wend. 874; *Woodworth v. Bank of America*, 19 Johns. 391, 10 Am. Dec. 239; *Sturges v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473; *Todd v. Lederach*, 4 Pa. Dist. Rep. 173; *Southwark Bank v. Gross*, 35 Pa. St. 80; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569. In *Etz v. Place*, 81 Hun, 203, 30 N. Y. Supp. 765, it is held that the addition of a clause making a note payable at a certain bank in the village in which both parties reside is an immaterial alteration. This case, it is submitted, is erroneous. It is certainly opposed to the weight of authority, and is by no means supported by the authority upon which it relies: *Troy City Bank v. Lauman*, 19 N. Y. 477. Another case equally erroneous is that of *Major v. Hansen*, 2 Biss. 195, Fed. Cas. No. 8982, in which the erasure of the words "payable at the Commercial Bank of Canada" was held immaterial, since the "only effect of erasing them was to give him the additional right of tendering the money wherever he might find the plaintiff," and that "as the rights of defendant are thereby enlarged and in no respect limited, and he cannot complain unless he . . . can show that he tendered the money at the place stated

and has been damnified." But by the overwhelming weight of authority, it is of no consequence whether the alteration would benefit or injure the defendant, and it is equally unimportant whether he has in fact been injured or not.

21. Alteration of Date.—It is settled that the alteration of the date of a written obligation to pay, or, indeed, of any instrument in which a date is a usual or a necessary part, is material and vitiates the writing so changed. This alteration may be of that portion which evidences the place at which the instrument was prepared, as in *Commercial Bank v. Patterson*, 2 Cranch C. C. 19, Fed. Cas. No. 3056; or it may take the more usual form of an alteration of that portion of the date which refers to the time of execution. In either case it is material: *Inglish v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Benedict v. Miner*, 58 Ill. 19; *Hamilton v. Wood*, 70 Ind. 306; *McCormick Harvesting Machine Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. 577; *Bank of Commonwealth v. McChord*, 4 Dana, 191, 29 Am. Dec. 398; *Miles v. Mayor*, 25 Ky. 153; *Hervey v. Harvey*, 15 Me. 357; *Mitchell v. Ringold*, 3 Har. & J. 159, 5 Am. Dec. 433; *Owings v. Arnot*, 33 Mo. 406; *Aubuchon v. McKnight*, 1 Mo. 312, 13 Am. Dec. 502; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Den v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Ruby v. Talbott*, 5 N. Mex. 251, 21 Pac. 72; *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep. 705, 43 N. E. 683; *Kennedy v. Lancaster County Bank*, 18 Pa. St. 347; *United States Bank v. Russel*, 3 Yeates, 391; *Wegner v. State*, 28 Tex. App. 419, 13 S. W. 608; *Wood v. Steele*, 6 Wall. 80. When, however, there is no date to the instrument, the addition of the date, from which the instrument would by law take effect is of course immaterial: *Gill v. Hopkins*, 19 Ill. App. 74.

22. Alteration of Medium of Payment.—Wherever the words "payable in gold" or "in specie" have the effect of rendering a bond payable in coin only, where before it might be discharged in legal tender of any description, the addition or erasure of such words is deemed a material alteration: *Darwin v. Rippey*, 63 N. C. 318; *Wills v. Wilson*, 3 Or. 308; *Bogarth v. Breedlove*, 39 Tex. 561. But where the law compels payment in gold, the addition of such words is of no effect, and the alteration is immaterial so far as affecting any rights on the paper: *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443. And so, where in *Church v. Howard*, 17 Hun, 5, the court held the erasure of the words "payable in gold or its equivalent" to be a material alteration, Learned, J., dissented (it would seem very properly) on the ground that the phrase permitted payment in currency as well as in gold, and that the change was therefore immaterial.

23. Addition of Waivers to Indorsement.—It is uniformly held that the addition of a waiver of any of the conditions of an in-

dorser's liability is a material alteration. Thus, adding "waiving protest and notice" or "demand and notice waived" is held to avoid the liability of the indorser: *Andrews v. Sims*, 33 Ark. 771; *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793; *Farmer v. Rand*, 14 Me. 225, 16 Me. 453; *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059. And on the same principle the addition of a waiver of exemptions to an indorsement is deemed material: *Jordan v. Long*, 109 Ala. 414, 19 South. 843.

24. **Alteration of Serial Numbers.**—While the law in England is undoubtedly otherwise (*Suffell v. Bank of England*, 9 Q. B. D. 555), the tendency of the courts of this country has been to hold the serial numbers on bonds, coupons, etc., no material parts of such instruments, and to deem the erasure or mutilation of such serial numbers an immaterial alteration: *State v. Cobb*, 64 Ala. 127, 157; *Commonwealth v. Emigrant Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126; *Goodfellow v. Inslee*, 12 N. J. Eq. 355; *Elizabeth v. Force*, 29 N. J. Eq. 587; *Schryver v. Hawkes*, 22 Ohio St. 308; *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652; *Noteholders v. Funding Board*, 84 Tenn. 46, 57 Am. Rep. 211; *Wylie v. Missouri Pac. Ry. Co.*, 41 Fed. 623.

25. **Alteration of Memoranda.**—Whether or not the alteration of a memorandum constituting part of a written instrument will operate to vitiate such instrument is of course determined by the rules governing the alteration of writings generally. But the difficulty here most frequently met with is the question of whether or not the memorandum does form a part of the contract. In both *Bay v. Shrader*, 50 Miss. 326, and *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382, this was held to depend upon the time when, and the intent with which, the memorandum was made. If, for instance, it was made as a mere mark of identification, it could not properly be said to be a part of the contract. On the other hand, if it was intended by the parties to form a part of their contract, effect will be given by the courts to such intent, and the memorandum will be deemed to be, and will be construed as, a material part of the contract. And while ordinarily an indorsement is held to be a new contract, entirely separable from that of the body of the note, and the alteration of which will not vitiate the note itself (*Howe v. Thompson*, 11 Me. 152), it is equally well settled that a memorandum may be written on the back of an instrument and yet form a part of it: *Johnston v. May*, 76 Ind. 293; *Dinsmore v. Duncan*, 57 N. Y. 579, 15 Am. Rep. 534. Once, however, it is determined that the parties did intend the memorandum as a part of their contract, it is well established that its removal or cancellation will be an alteration of the contract, and, if material, will avoid it: *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 474; *Cornell v. Nebeker*, 48 Ind. 463; *Cochran v. Nebeker*, 48 Ind. 460; *State v. Stratton*, 27 Iowa, 420, 1 Am. Rep. 282; *Johnson v. Heagan*, 23 Me.

329; *Wheelock v. Freeman*, 13 Pick. 165, 23 Am. Dec. 674; *Walt v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 528; *Gerrish v. Glines*, 56 N. H. 9; *Brown v. Reed*, 79 Pa. St. 570, 21 Am. Rep. 75; *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382; *Warrington v. Early*, 2 El. & B. 763. And in the absence of clear proof to the contrary, it will be presumed that the memorandum was intended to form a part of the contract: *Johnson v. Heagan*, 23 Me. 329. Whether or not the negligence of the maker in rendering the removal of the memorandum easy is a sufficient reply to the defense of alteration, will be considered in a later portion of this note: See post, p. 119.

26. **Alteration of Subject Matter, etc.**—The above are the more usual alterations and from their frequent recurrence are now fairly well classified, and the authorities with reference to their materiality are quite uniform. Those alterations, the types of which are of more infrequent occurrence, are quite as numerous, and are by no means as well classified or as harmonious in the decisions upon them. It will be impossible, therefore, to do more than to indicate generally what has been held to be material or not, as the case may be. Mere corrections of names, the addition of middle names, etc., are held to be immaterial: *King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Banks v. Lee*, 73 Ga. 25; *Cole v. Hills*, 44 N. H. 227; *Struthers v. Kendall*, 41 Pa. St. 214, 80 Am. Dec. 610; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389. Changing "I promise" to "We promise" is immaterial: *Eddy v. Bond*, 19 Me. 461, 36 Am. Dec. 767. Contra, *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; especially where but one sign: *Kline v. Raymond*, 70 Ind. 271. Generally, an acknowledgment of consideration is held immaterial: *Reed v. Kemp*, 16 Ill. 445; *Riggs v. St. Clair*, 1 Cranch C. C. 606, Fed. Cas. No. 11,829. Contra, *Low v. Argrove*, 80 Ga. 129. The addition or erasure of a provision for attorneys' fees is material: *Coles v. Yorks*, 28 Minn. 464, 10 N. W. 775; *First Nat. Bank v. Laughlin*, 4 N. Dak. 391, 61 N. W. 473. In states where seals are still employed, the addition or removal of a seal is a material alteration: *Rawson v. Davidson*, 49 Mich. 607, 14 N. W. 565; *Evans v. Williams*, 79 N. C. 86; *Biery v. Haines*, 5 Whart. 563; *Vaughan v. Fowler*, 14 S. C. 355, 37 Am. Rep. 731; *Organ v. Allison*, 68 Tenn. 459. The alteration of an instrument whereby it is made to cover a subject matter greater, less, or different than that embraced in it before the alteration is, of course, material: *Willard v. Ostrander*, 51 Kan. 481, 37 Am. St. Rep. 294, 32 Pac. 1092; *Osborne v. Van Houten*, 45 Mich. 444, 8 N. W. 77; *Martendale v. Follet*, 1 N. H. 95; *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. 270; *Johnson v. Brown*, 51 Ga. 498; *Babb v. Clemson*, 10 Serg. & R. 419, 13 Am. Dec. 684. And see upon the question of materiality, generally, the following cases: *Davis v. Carlisle*, 6 Ala. 707; *Mayres v. Dunlap*, 39 Ill. App. 618; *Vandevoort v. Insurance Co.*, 49 Ill. App. 457; *Hert v. Oehler*, 80

Ind. 83; Chadwick v. Eastman, 53 Me. 12; Cushing v. Field, 70 Me. 50, 35 Am. Rep. 293; Martin v. Good, 14 Md. 398, 74 Am. Dec. 545; Rhoades v. Castner, 94 Mass. 130; Prudden v. Nester, 103 Mich. 540, 61 N. W. 777; Leonard v. Phillips, 89 Mich. 182, 33 Am. Rep. 370; Chicago etc. Co. v. O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4; Palmer v. Largent, 5 Neb. 223, 25 Am. Rep. 479; Reeves v. Pearson, 23 Hun, 185; Belleville etc. Works v. Samuelson etc. Co., 16 Utah, 234, 52 Pac. 282; Brady v. Berwind-White etc. Co., 106 Fed. 824, 45 C. C. A. 662.

III. By Whom Made.

a. **When Made by or with the Consent of Party Setting up Alteration as a Defense.**—But in order that an alteration have the effect of vitiating the instrument altered, more is required than merely that the alteration be material. The questions of the party by whom, the time when, and (to a limited extent) the intent with which, the alteration was made, are equally important in determining the effect of an alteration.

It is of course an elemental proposition that no person can by any fraudulent act of his own rid himself of an obligation due from him to another. And so, in accordance with this, it is plain that no person can, by the deliberate alteration of an instrument, relieve himself from liability thereon: Bingham v. Shadle, 45 Neb. 82, 68 N. W. 143. To sanction any other doctrine would be to place a premium on fraud, and to render alteration of written instruments a profitable, rather than a dangerous, pursuit.

For the same reason it is held that an alteration made with the consent of the party who seeks to set up the defense of alteration cannot release him from liability. Having consented to the alteration, he has no just ground of complaint: Sill v. Reese, 47 Cal. 294; Miller v. Williams, 27 Colo. 34, 59 Pac. 740; Prettyman v. Goodrich, 23 Ill. 330; Brock v. Brock, 29 Ill. App. 334; Price v. Cochran, 4 Ky. 570; People v. Brown, 2 Doug. (Mich.) 9, 40 Am. Dec. 33; Collins v. Collins, 51 Miss. 311, 24 Am. Rep. 632; Mace v. Heath, 30 Neb. 620, 46 N. W. 918; Penny v. Corwith, 18 Johns. 499; Martin v. Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338; Taddiken v. Cantrell, 69 N. Y. 597, 25 Am. Rep. 253; Martin v. Buffalo, 121 N. C. 34, 27 S. E. 995; Huntington v. Finch, 3 Ohio St. 445; Schmels v. Rix, 95 Va. 509, 28 S. E. 890. And an alteration made with the privity of the holder has the same effect as though made by the holder himself: Soaps v. Eichberg, 42 Ill. App. 375.

b. **Must be by One not a Stranger to the Instrument.**

1. **General Rule.**—By Pigot's Case, 6 Reports, part 11, page 27, it was held that any alteration in a material part, though by a stranger to the instrument, avoided it. But the injustice and unreasonableness of this rule led to its early abandonment. "A doctrine so repugnant to common sense and justice," says Story, J., in

the frequently cited extract from his opinion in *United States v. Spalding*, 2 Mason, 478, Fed. Cas. No. 16,365, "which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the Providence of Heaven, ought to have the unequivocal support of unbroken authority, before a court of law is bound to surrender its judgment to what deserves no better name than a technical quibble. It appears to me to be shaken to its very foundation in modern times, and every case which upholds a remedy at law, when the deed is lost by time or accident is decisive against it." And in the excellent case of *Bigelow v. Stilphens*, 35 Vt. 521, the injustice of "the old rule is most clearly brought out." "Clearly, it is not just that a man should be deprived of an honest debt or have the evidence of it destroyed for all beneficial purposes, in consequence of the misconduct of a stranger to whose act he did not assent, and of which he had no knowledge. . . . It is difficult to understand why a man who has done no wrong, nor consented that any should be done, should be punished to the extent of the amount of his demand by having his claim canceled by operation of law, solely because another has been guilty of an act for which he ought to be punished. Public policy does not require any such rule. Declaring the instrument void in case of alteration has no tendency to deter a stranger from making such alteration. Punishment inflicted upon the innocent has no terror for the guilty. . . . We think the rule, as indicated by reason and authority, is, that an alteration of a written instrument by a stranger without authority does not render such instrument void." And such is the undoubted rule: *Davis v. Carlisle*, 6 Ala. 707; *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; *Andrews v. Callaway*, 50 Ark. 358, 7 S. W. 449; *Langenberger v. Kroeger*, 48 Cal. 147, 17 Am. Rep. 418; *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115; *Nichols v. Johnson*, 10 Conn. 192; *Orlando v. Gooding*, 34 Fla. 244, 15 South. 770; *Scott v. Walker*, Dud. (Ga.) 243; *Condict v. Flower*, 106 Ill. 105; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Collins v. Makepeace*, 13 Ind. 448; *John v. Hatfield*, 84 Ind. 75; *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673; *Andrews v. Burdick*, 62 Iowa, 714, 16 N. W. 275; *Mathias v. Leathers*, 99 Iowa, 18, 68 N. W. 449; *Lee v. Alexander*, 48 Ky. 25, 48 Am. Dec. 412; overruling *Letcher v. Bates*, 6 J. J. Marsh. 524, 22 Am. Dec. 92; *Wickes v. Caulk*, 5 Har. & J. 36; *Chessman v. Whittemore*, 40 Mass. 231; *White etc. Machine Co. v. Dakin*, 86 Mich. 581, 49 N. W. 583; *Russell v. Reed*, 36 Minn. 376, 31 N. W. 452; *Craft v. White*, 36 Miss. 455; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Medlin v. Platte Co.*, 8 Mo. 235, 40 Am. Dec. 135; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Perkins Windmill Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098; *State v. Manhattan Min. Co.*, 4 Nev. 318; *Ohesley v. Frost*, 1 N. H. 145; *Ruby v. Talbott*, 5 N. Mex. 251, 21 Pac. 72; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Elizabeth v. Force*, 29 N. J. Eq. 587; *Rees v. Over-*

baugh, 6 Cow. 746; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498, 5 N. E. 338; *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299; *Tarbill v. Richmond City Mill Works*, 2 Ohio C. C. 564; *Whitlock v. Manciet*, 10 Or. 166; *Neff v. Horner*, 63 Pa. St. 327, 3 Am. Rep. 555; *Sykes v. Gerber*, 98 Pa. St. 179; *Port Huron etc. Co. v. Sherman*, 14 S. Dak. 461, 85 N. W. 1008; *Organ v. Allison*, 68 Tenn. 459; *Tutt v. Thornton*, 57 Tex. 35; *Newell v. Mayberry*, 3 Leigh, 250, 23 Am. Dec. 261; *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969; *Yeager v. Musgrave*, 28 W. Va. 90; *Gordon v. Robertson*, 48 Wis. 493, 4 N. W. 579; *Smith v. United States*, 2 Wall. 219; *Wylie v. Missouri Pac. Ry. Co.*, 41 Fed. 623. In England, however, the old doctrine seems, after some fluctuation of sentiment, to have been adopted as the true rule, and it would seem that an alteration by a stranger, if in a material part (*Aldous v. Cornwell*, 3 Q. B. 573), would avoid the instrument: *Hindustan Bank v. Smith*, 36 L. J. C. P. 24; *Davidson v. Cooper*, 13 Mees. & W. 343.

There is in this connection, however, a distinction to be observed between paper already issued and that not fully executed. An alteration by a stranger in the former case could have no possible effect in vitiating the instrument. If it mutilated the instrument so that it was thereby made illegible, it might compel the production of secondary evidence to prove its contents. But there its effects would cease. An alteration by a stranger, however, before both parties to the instrument had signed it, but after its execution by one, might very effectually prevent the formation of a contract. This, not because of the law of alteration of instruments, but simply because by reason of such alteration, the necessary meeting of minds had been prevented and a contract thus rendered impossible: *Blakey v. Johnson*, 13 Bush, 197, 26 Am. Rep. 254.

2. *Implied Authority from Holder.*—But here, as is usual, the difficulty is not in forming the rule, but in the application of it. It is well settled that an alteration by a stranger is not, strictly speaking, an alteration at all, but merely a "spoliation." Who is a "stranger" to the instrument, and who is an authorized agent, are far more difficult questions. And it is with these that by far the greater body of the law relating to alterations by strangers deals. The cases in which express authority to alter has been given by the holder are plain and of infrequent occurrence. But exactly what facts shall be held to give rise to an implied authority to alter, in one who would otherwise be a stranger, is a question by no means free from difficulty, and which is not at all of infrequent occurrence. Perhaps the only rule of any general application here possible is that the law will not ordinarily imply an authority from the holder of an instrument, making another an agent for the purpose of altering such instrument: *Langenberger v. Kroeger*, 48 Cal. 147, 17 Am. Rep. 418; *Patterson v. Higgins*, 58 Ill. App. 268; *Brooks v. Allen*, 62 Ind. 401; *Mathias v. Leathers*, 99 Iowa, 18, 68

N. W. 449; Hollingsworth v. Holbrook, 80 Iowa, 151, 20 Am. St. Rep. 411; White Sewing Machine Co. v. Dakin, 86 Mich. 581, 49 N. W. 583; Ames v. Brown, 22 Minn. 257; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Ruby v. Talbott, 5 N. Mex. 251, 21 Pac. 72; Waldorf v. Simpson, 15 App. Div. 297, 44 N. Y. Supp. 921. This is in accordance with the rule of law that fraud will never be presumed, and this rule is in the case of alteration of writings reinforced by the fact that such act constitutes most cases not merely a fraud, but a crime as well.

3. **Alterations by Special Agent of Holder.**—So from a mere authority to receive a note, an agent will not have presumed authority to alter it: Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Hunt v. Gay, 35 N. J. L. 227, 10 Am. Rep. 232; Ruby v. Talbott, 5 N. Mex. 251, 21 Pac. 72; Waldorf v. Simpson, 15 App. Div. 297, 44 N. Y. Supp. 921. In Perkins Windmill Co. v. Tillman, 55 Neb. 652, 75 N. W. 1098, the court thought that "there was room for doubt," whether an agent with authority to receive a note in payment and transmit it to his principal was not an agent to alter. It would however, seem that upon authority at least there is no "room for doubt," and that for this purpose at least such an agent is in the same position as any other stranger to the instrument. His act in altering the instrument amounts to a spoliation and no more: See, also, Hollingsworth v. Holbrook, 80 Iowa, 151, 20 Am. St. Rep. 411, 45 N. W. 561.

4. **Alterations by One Pecuniarily Interested in the Instrument.** Where, however, the party guilty of the alteration has himself an interest in the paper, he cannot be considered a "stranger." Thus, in McMurtrey v. Sparks, 71 Mo. App. 126, it was held that the administrator of an estate has such an interest in a note that his act is that of a party to the instrument. "The administrator of a decedent is the title holder of the personal assets of the estate for the purposes of administration, and has a pecuniary interest in them for the commission allowed by law. The plaintiff in this case was not a stranger to the note, and the first change made by him was a material alteration, not a spoliation, which avoided the instrument against the maker."

5. **Alterations by Thief.**—For the purpose of determining the effect of an alteration made by a thief while in possession of the paper, it was held in Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534, that such thief was not a "holder" of the instrument, but a stranger to it, and such is undoubtedly the true rule: Elizabeth v. Force, 29 N. J. Eq. 587; Commonwealth v. Emigrant Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126. Contra, Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496.

6. **Alterations by Public Officers.**—In general, it is held that public officers who alter bonds, etc., intrusted to them in their

official capacity are not strangers to such instruments, and that alterations by them have the effect of discharging all parties from liability on such instruments. In *Dover v. Robinson*, 64 Me. 183, where the selectmen of the town of Dover had altered the penal sum of a bond intrusted to their custody, it was sought to avoid the effect of an alteration by urging the doctrine that public officers are not agents of the town in the commission of a wrongful act in the performance of a public duty imposed upon them by statute. The court, however, said: "It is no legitimate consequence of this doctrine to subject the debtors of a town to the increased liabilities which might ensue from an undetected alteration of the instruments which form the evidence of their indebtedment, where such alteration is made with the permission of the financial agents of the town, and to hold that such tampering with written obligations entails no risk of loss when unsuccessfully attempted. . . . To be relieved from a liability incurred through the unauthorized and unlawful act of a public officer is one thing—to enforce as a valid subsisting claim a bond which has been vitiated with the consent of those who rightfully had it in keeping on behalf of the town is quite another." And see to the same effect: *Wegner v. State*, 28 Tex. App. 419, 13 S. W. 608; *Gragg v. State*, 18 Tex. App. 295; *Heath v. State*, 14 Tex. App. 213; *Collins v. State*, 16 Tex. Ct. App. 275.

7. **Implied Authority from Maker.**—An alteration by the party whom it is sought to charge upon an instrument cannot, as has been already pointed out, release him from liability. The paper as altered is his instrument, and he may be held liable upon it. The same is, of course, true when the alteration is made by an agent of such party acting under an authority express or implied. Where the authority to alter is express, no doubt as to the law of the case can arise. But such cases are infrequent, and, as a consequence, the doctrine of implied authority is continually being invoked to fasten the act of the holder or a third person upon the party setting up the defense of alteration. When, then, is an authority from the maker to alter an instrument implied?

The general rule may here be said to be that an authority from the maker or party whom it is sought to charge to alter an instrument will not ordinarily be presumed. And it is therefore held, and is now well established, that a party claiming authority from the maker to alter must show such authority. The burden of proof is upon him: *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201; *Warder etc. Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300; *Capital Bank v. Armstrong*, 62 Mo. 59; *Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. 283; *North v. Henneberry*, 44 Wis. 306; *Sneed v. Sabinal etc. Co.*, 20 O. C. A. 230, 73 Fed. 925. Contra, *Hagan v. Merchants'*

etc. Ins. Co., 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; *Baxter v. Camp*, 71 Conn. 245, 71 Am. St. Rep. 169, 41 Atl. 803.

8. **Alterations by Co-obligor.**—In accordance with this rule, that authority to alter will not be presumed, it is quite uniformly held that one obligor has no authority from a co-obligor to alter after the latter has signed. This is supported by the weight of authority where both parties are principal makers: *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113; *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, 27 N. W. 379; *Draper v. Wood*, 112 Mass. 815, 17 Am. Rep. 92. And it is equally well settled where, even before negotiation, the terms of an instrument are altered by the principal debtor, such alteration will discharge a surety or accommodation indorser. No agency will here be implied either from the relation of the parties, or from the fact that the surety has intrusted the instrument to the principal debtor to deliver or negotiate: *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Aetna Nat. Bank v. Winchester*, 43 Conn. 391; *Lisle Rogers*, 18 B. Mon. 528; *Blakey v. Johnson*, 13 Bush, 197, 26 Am. Rep. 254; *Waterman v. Vose*, 43 Me. 504; *Stoddard v. Penniman*, 108 Mass. 866, 11 Am. Rep. 363; *Bradley v. Mann*, 37 Mich. 1; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *Fred Helm Brewing Co. v. Hazen*, 55 Mo. App. 277; *Robinson v. Berryman*, 22 Mo. App. 509; *Britton v. Dreiker*, 46 Mo. 591, 2 Am. Rep. 553; *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692; *Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664; *Patterson v. McNeeley*, 16 Ohio St. 348; *Neff v. Horner*, 63 Pa. St. 327, 3 Am. Rep. 555; *McVey v. Ely*, 5 Lea, 438; *Wood v. Steel*, 6 Wall. 80. Contra. *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880, 32 Pac. 538. And in general, no agency to alter will be implied from any other agency, special in its nature, such as an agency to deliver or negotiate a written instrument: *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115; *Aetna Bank v. Winchester*, 43 Conn. 391; *Prettyman v. Goodrich*, 23 Ill. 270; *Blakey v. Johnson*, 13 Bush, 197, 26 Am. Rep. 254; *Mace v. Heath*, 30 Neb. 620, 46 N. W. 918; *Schwalm v. McIntyre*, 17 Wis. 232; *Hall v. Weaver*, 34 Fed. 104.

9. **Implied Authority in Holder to Fill Blanks.**—While it is undoubtedly the general rule that no authority from the maker to alter will be implied, there is an equally undoubted exception of as frequent application as is the general rule itself. This exception has reference to the authority from the maker which is said to be implied from the delivery to another of an instrument containing blanks which should ordinarily be filled. Briefly stated, it is, that where one has intrusted an instrument, containing blanks, to another with the intent to become bound thereon, he will be liable upon the instrument though the blanks be filled. He is deemed to have given an implied authority to the payee or holder

to fill the blanks with the proper terms. Thus, instruments blank as to date, payee, place of payment, etc., may be supplied with any date, payee, or place of payment: *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498; *Visher v. Webster*, 8 Cal. 109; *Fisher v. Dennis*, 6 Cal. 577, 65 Am. Dec. 534; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201; *Cannon v. Grigsby*, 16 Ill. App. 558; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Grimes v. Piersol*, 25 Ind. 246; *Holland v. Hatch*, 11 Ind. 497, 71 Am. Dec. 363; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152; *Iowa etc. Bank v. Sigstad*, 96 Iowa, 491, 65 N. W. 407; *State v. Matthews*, 44 Kan. 596, 25 Pac. 36; *Lowden v. Schoharie County Bank*, 38 Kan. 533, 16 Pac. 748; *Woolfolk v. Bank of America*, 73 Ky. 504; *Jones v. Shelbyville Fire Ins. Co.*, 58 Ky. 58; *Bank of Commonwealth v. McChord*, 4 Dana, 191, 29 Am. Dec. 398; *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371, 17 Atl. 378; *Smith v. Crooker*, 5 Mass. 538; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; *Wilson v. Henderson*, 17 Miss. 375, 48 Am. Dec. 716; *Capital Bank v. Armstrong*, 62 Mo. 59; overruling *Washington Sav. Bank v. Ecky*, 51 Mo. 272; *Roe v. Town Mutual Fire Ins. Co.*, 78 Mo. App. 432; *Ivory v. Michael*, 33 Mo. 398; *Reed v. Morton*, 24 Neb. 760, 8 Am. St. Rep. 247, 40 N. W. 282; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Bruce v. Westcott*, 3 Barb. 374; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Campbell v. McArthur*, 2 Hawks, 83, 11 Am. Dec. 738; *Marshall v. Wilhite*, 2 O. C. D. 500; *Stahl v. Berger*, 10 Serg. & R. 170, 13 Am. Dec. 666; *Wessel v. Glenn*, 108 Pa. St. 104; *Witte v. Williams*, 8 S. C. 290, 28 Am. Rep. 294; *Waldron v. Young*, 56 Tenn. 777; *Butler v. United States*, 21 Wall. 272; *Angle v. North Western Mut. Life Ins. Co.*, 92 U. S. 330; *Russell v. Langstaffe*, Doug. 516; *Montague v. Perkins*, 22 Eng. L. & Eq. 516. And there is this implied authority in the case of any blank. The date, sum, payee, place of payment, time of payment, rate of interest, may all or any of them be left blank, and a holder will have implied authority to fill such blanks: See as to blank filled with—1. Sum: *Johnson v. Blasdale*, 9 Miss. 17, 40 Am. Dec. 85; *Hall v. Bank of Commonwealth*, 5 Dana, 258, 30 Am. Dec. 685; 2. Place of payment: *Waggoner v. Millington*, 8 Hun, 142; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Light v. Kellinger*, 16 Ind. App. 102, 59 Am. St. Rep. 313, 44 N. E. 760; 3. Date of payment: *Bingham v. Reddy*, 5 Ben. 266, Fed. Cas., No. 1414; 4. Rate of interest: *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152; 5. Name of maker: *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; 6. Where entire instrument was blank: *Ives v. Farmers' Bank*, 2 Allen, 236; 7. Date: *Page v. Morrell*, 8 Abb. Dec. 438;

8. Name of payee: *Schooler v. Tilden*, 71 Mo. 580; *Stahl v. Berger*, 10 Serg. & R. 170, 13 Am. Dec. 666.

10. **Excess of Implied Authority to Fill Blanks by Addition of Unnecessary Terms or by Erasures, etc.**—But this implied authority is by no means unlimited. While it is permissible to fill blanks with any sum, place of payment, etc., it is not permissible to erase any portion of the instrument. Any alteration of the instrument in a part in which it is complete and perfect is a material alteration, and vitiates the instrument. The implied authority to fill blanks does not carry with it the authority to vary or alter the material terms by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning by filling blanks with terms repugnant to what was plainly expressed in the instrument, nor by adding terms which are not necessary to the completion of the writing or instrument. The reason for this limitation is obvious, and is well expressed in *Mohaiwe Bank v. Douglass*, 31 Conn. 170: "Where one indorses an inchoate instrument, the presumed authority which passes from the indorser with the instrument is only to fill up existing blanks, in order to complete the instrument begun. It can never be presumed that a special agent is authorized, not only to do what his principal has left undone, but also to undo what his principal has done, and do another thing instead of it."

In accordance with this principle it is held, quite uniformly, that it is a material alteration to add an interest clause to a note or other instrument containing no blank for such a clause. Such clause is considered "a stipulation in no manner essential or necessary to the note as a completed instrument": *Hoopes v. Collingwood*, 10 Colo. 107, 8 Am. St. Rep. 565, 13 Pac. 909; *Schnewind v. Hacket*, 54 Ind. 248; *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372. *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, is a case in which this limitation has been stretched to an unusual extent. In that case the defendant signed a promissory note ending with the phrase "with interest at." Afterward the words "ten per cent" were written in the space following "at." *Christiancy, J.*, in his opinion says: "In the case before us, the insertion of the words 'ten per cent' at the end of the note after the single printed word 'at,' can hardly be called the filling a blank at all. . . . We are entirely satisfied that this note when signed without the addition of the words 'ten per cent' was, notwithstanding the word 'at,' in legal effect a complete and valid note, drawing interest at the legal rate of seven per cent; and that the word 'at' at the end of the printed form might readily be overlooked by the signer or disregarded as of no consequence if noted at all: and that there was, therefore, no such blank left in it as would warrant the payee or holder,

without further evidence of assent, to insert a different rate of interest." This case and that of *Hoopes v. Collingwood*, 10 Colo. 107, 3 Am. St. Rep. 565, 13 Pac. 909, would seem to go to the full limit of holding such an alteration not a filling of a blank, and in neither are the reasons given by the court at all convincing: See, also, *Fisher v. Dennis*, 6 Cal. 577, 65 Am. Dec. 534; *Yost v. Minneapolis Harvester Works*, 41 Ill. App. 556; *Conger v. Crabtree*, 68 Iowa, 536, 45 Am. St. Rep. 249, 55 N. W. 335.

So unless there be a blank left for the place of payment, the addition of a clause providing for payment at a certain place is held to be an unauthorized alteration and renders the instrument void. Where, however, the instrument ends with the phrase "payable at —," the addition of words indicating the place of payment is held (contrary to *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661), to be merely the filling of a blank: *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201; *Cannon v. Grigsby*, 16 Ill. App. 558; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Light v. Killinger*, 16 Ind. App. 102, 59 Am. St. Rep. 313, 44 N. E. 760; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Waggoner v. Millington*, 8 Hun, 142. See *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64.

A date not being an essential part of a note, it was held in *Inglish v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96, that the absence of a date in a note did not carry implied authority to insert any date, especially after the note had once been negotiated. But this case seems opposed to the weight of authority, which, recognizing the importance of a date and the infrequency of an undated instrument, holds that a blank for a date may be filled without availing the instrument: *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Page v. Morrell*, 3 Abb. Dec. 433. Compare *Mitchell v. Ringgold*, 3 Har. & J. 159, 5 Am. Dec. 433. *Inglish v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96, is frequently attempted to be distinguished on the ground that the true date was not there inserted. This distinction does not, however, distinguish it, for it is uniformly held that the implied authority will authorize the insertion of any sum, date of payment, in the blank, at least so far as a bona fide holder is concerned, and in the case under consideration, the court expressly refused to decide whether the plaintiff or a prior holder had committed the alteration. The only distinction which the court there made, and that is by no means satisfactory, was that in the case before it the note was altered after negotiation, whereas it claimed that the other cases were of notes altered while still in fieri.

Other cases in which the alterations were held to be unauthorized are instanced by the following. It was held that the addition of "or order" to the name of the payee in a completed note was an unauthorized and vitiating alteration: *Marshall v. Wilhite*, 2

O. C. D. (Ohio), 500; Bruce v. Westcott, 3 Barb. 374. And blanks left in an instrument cannot be filled with an unusual undertaking: Clawson v. Gustin, 5 N. J. L. 821. Nor with a clause entirely unnecessary to the completion of the instrument: Holland v. Hatch, 11 Ind. 497, 71 Am. Dec. 363; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; Burrows v. Klunk, 70 Md. 451, 14 Am. St. Rep. 371, 17 Atl. 378; Ivory v. Michael, 33 Mo. 398. Nor is it within the implied authority to so fill the blanks in an instrument as to change its scope or alter its apparent design: Mohaiwe Bank v. Douglass, 31 Conn. 170; Angle v. Northwest Mut. Life Ins. Co., 92 U. S. 330. Compare, however, Ives v. Farmers' Bank, 2 Allen, 236. And see generally as to exceeding the implied authority to fill blanks, Adair v. Egland, 58 Iowa, 314, 12 N. W. 277; Grimes v. Piersol, 25 Ind. 246; Lisle v. Rogers, 57 Ky. 528.

11. **Alteration by Agent of Maker in Excess of Express Authority to Fill Blanks.**—Closely connected with these cases of implied authority to fill blanks are those cases in which the maker of an instrument executes it, leaving blanks for certain terms, and then authorizes another to fill these in a certain way. In case the agent exceeds his authority and fills them in a way not authorized, the interesting question of the maker's liability on the instrument so altered arises. The question may arise as between the maker and the party who exceeded his authority, or one who took with knowledge of the agent's having exceeded his authority, or, on the other hand, it may arise as between the maker and a bona fide purchaser, who took without any knowledge of the agent's limited powers or his having transgressed the bounds of his authority.

As between the maker and the party who exceeded his authority the maker cannot, of course, be held for the amount of or on the instrument as altered. It is an elemental principle of the law of agency that the agent has only such authority as is given him by his principal, and that as between himself and the principal, any act done in excess of such authority is void: Green v. Sneed, 101 Ala. 205, 46 Am. St. Rep. 119, 13 South. 277; Fisher v. Dennis, 6 Cal. 577, 65 Am. Dec. 534; Yost v. Minneapolis Harvester Works, 41 Ill. App. 556; Pope v. Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835; Bell v. State Bank, 7 Blackf. 456; Conger v. Crabtree, 88 Iowa, 536, 45 Am. St. Rep. 249, 55 N. W. 335; State v. Matthews, 44 Kan. 596, 25 Pac. 36; Johnson v. Blasdale, 9 Miss. 17, 40 Am. Dec. 85. And the same rule obtains where a third party has come into possession of the note, but with knowledge of the excess of authority on the part of the agent. As is said in Toomer v. Rutland, 57 Ala. 379, 29 Am. Rep. 722: "When express authority is given to fill the blanks in one respect only, that authority must be pursued and no other can be exercised." And a person who takes with knowledge of the overreaching of his pow-

ers by the agent stands in the same position as the immediate party. So far the case is clear. But two cases—*Fisher v. Dennis*, 6 Cal. 577, 65 Am. Dec. 534, and *Johnson v. Blasdale*, 9 Miss. 17, 40 Am. Dec. 85—permit recovery for the original amount of the note, even as between the immediate parties, giving as a ground the familiar rule of agency that an agent's acts, when he exceeds his authority, bind his principal to the extent of his authority, and are void only as to the excess. This is, it is submitted, to confuse two subjects in no way connected. Whatever may be the liability of the principal on the original debt, he is not liable for any amount on the instrument. To the extent that the agent exceeded his authority, the filling of the blanks was a material alteration and avoided the instrument altogether. It was not (as was *Fullerton v. Sturges*, 4 Ohio St. 529) the act of a stranger, but was the act of a party and it released the maker from all liability on the instrument.

Where, however, the question arises between the maker who has executed an instrument in blank and a bona fide holder who took it without any knowledge of the fact that the blanks had been filled in an unauthorized manner, it is held that the bona fide holder can recover in spite of such unauthorized action. In *Fullerton v. Sturges*, 4 Ohio St. 529, it was said: "No rule is better settled or founded upon stronger reasons than that which affirms the liability of one intrusting his name in blank to another, to the full extent to which such other may see fit to bind him, when the paper is taken in good faith and without notice, actual or implied, that the authority given had been exceeded, or that the confidence reposed had been abused. It has the effect of a general letter of credit, and the rule is founded not only upon that principle of general jurisprudence which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury; but also upon that rule of the law of agency which makes the principal liable for the acts of his agent, notwithstanding his private instructions have been disregarded, when he has held the agent out as having a more enlarged authority": *State v. Matthews*, 44 Kan. 596, 25 Pac. 36; *Lowden v. Schoharie County Bank*, 38 Kan. 533, 16 Pac. 748; *Jones v. Shelbyville Fire Ins. Co.*, 58 Ky. 58; *Woolfolk v. Bank of America*, 73 Ky. 504; *Ives v. Farmers' Bank*, 2 Allen, 236; *Van Duzer v. Howe*, 21 N. Y. 531; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Waldron v. Young*, 56 Tenn. 777; *Michigan Bank v. Eldred*, 9 Wall. 544; *Montague v. Perkins*, 22 Eng. L. & Eq. 516, 22 L. J. Com. P., N. S., 187.

IV. Time When Made.

a. *Alterations Made Before Execution.*—It is well settled that an alteration made before the execution of an instrument has no effect whatever. Strictly speaking, it is not to be regarded as an

alteration at all. An alteration, properly speaking, is an alteration of the instrument as executed by the parties and cannot properly refer to an erasure appearing upon the instrument at the time of execution: *Roberts v. Unger*, 30 Cal. 676; *Chapman v. Sargent*, 6 Colo. App. 438, 40 Pac. 849; *Warder etc. Co. v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. 88; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527; *Fowles v. Beber*, 59 Mo. App. 401; *Coney v. Laird*, 153 Mo. 408, 55 S. W. 96; *Hill v. Barnes*, 11 N. H. 397; *Xander v. Commonwealth*, 102 Pa. St. 434; *Bell v. Boyd*, 76 Tex. 133, 13 S. W. 232; *Williams v. Starr*, 5 Wis. 534.

b. *Alteration of Accommodation Paper Before Delivery to Payee.*—Such is undoubtedly the general rule. But in a few instances an attempt has been made to distinguish from contracts and other instruments generally that class commonly known as accommodation paper: *Douglas v. Scott*, 8 Leigh, 43; *Bingham v. Reddy*, 5 Ben. 266, Fed. Cas. No. 1414. This attempted distinction was upon the ground that an accommodation bill was not issued so as to be incapable of alteration until it comes into the hands of one entitled to treat it as an available security: *Douglas v. Scott*, 8 Leigh, 43, citing *Downes v. Richardson*, 5 Barn. & Ald. 674. This case and the other English cases at times cited in support of this doctrine are based upon the old English stamp acts and hold no more than that an accommodation bill may be altered without requiring a new stamp, since it cannot be said to be "issued" "until it has reached the hands of one entitled to treat it as an available security." Such cases plainly do not support the doctrine contended for, and it is no longer doubtful that by the weight of authority an accommodation instrument may be vitiated by an alteration made before delivery to the payee, whether such alteration be made by a principal or by any other party to the paper. "A surety," said the court in *Waterman v. Vose*, 43 Me. 504, "has a right to stand on the very terms of his contract, and if he does not assent to a variation of it and a variation is made, it is fatal. This doctrine certainly does not fall to apply to a contract which has been altered materially, after it has passed from the hands of the surety or indorser, though it has not been delivered to the party authorized to treat it as available. After a material alteration, it is not the contract the party signed, and a negotiation first made after the alteration cannot make it his contract. The distinction . . . has no foundation in reason or in law": *Aetna Nat. Bank v. Winchester*, 43 Conn. 391; *Schnewind v. Hacket*, 54 Ind. 248; *Waterman v. Vose*, 43 Me. 504; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Bradley v. Mann*, 37 Mich. 1; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 268; *Fred. Helm Brewing Co. v. Hazen*, 56 Mo. App. 277; *Hagler v.*

State, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692; McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372; Patterson v. McNeeley, 16 Ohio St. 348; Jones v. Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Fulmer v. Seitz, 68 Pa. St. 237, 8 Am. Rep. 172; Wood v. Steele, 6 Wall. 80.

V. Intent with Which Made.

a. General Rule.—With reference to the intent with which the alteration was done, the general rule is that the motive or intent of the parties is immaterial. A material alteration by a party to an instrument in general vitiates it, although the intent may not have been fraudulent and the motives may have been entirely honest. And upon the other hand an immaterial alteration is of no effect, and it is of no consequence that the intent of the party was fraudulent and his motives dishonest. "It is not the motive, but the act of alteration, which discharges." The doctrine has its foundation quite as much in the desire of the law to prevent fraud and the unauthorized tampering with instruments, as in its desire to punish fraud when detected: Green v. Sneed, 101 Ala. 205, 46 Am. St. Rep. 119, 13 South. 277; Toomer v. Rutland, 57 Ala. 379, 29 Am. Rep. 722; Glover v. Robbins, 49 Ala. 219, 20 Am. Rep. 272; Broughton v. West, 8 Ga. 248; Law v. Argrove, 30 Ga. 129; Soaps v. Eichberg, 42 Ill. App. 375; Magees v. Dunlap, 39 Ill. App. 618; Hamilton v. Wood, 70 Ind. 306; Eckert v. Pickle, 59 Iowa 545, 13 N. W. 708; Murray v. Graham, 29 Iowa, 520; Sheley v. Sampson, 5 Kan. App. 465, 46 Pac. 994; Davis v. Eppler, 38 Kan. 629, 16 Pac. 793; Phoenix Ins. Co. v. McKernan, 100 Ky. 97, 37 S. W. 490; Wheelock v. Freeman, 13 Pick. 165, 23 Am. Dec. 674; Fay v. Smith, 1 Allen, 477, 79 Am. Dec. 752; Aldrich v. Smith, 87 Mich. 468, 26 Am. Rep. 536; Moore v. Hutchinson, 60 Mo. 429; State Sav. Bank v. Shaffer, 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980; Booth v. Powers, 56 N. Y. 22; Meyer v. Huneke, 55 N. Y. 412; Harsh v. Klepper, 28 Ohio St. 200; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Richardson v. Fellner, 9 Okla. 513, 60 Pac. 270; Miller v. Stark, 148 Pa. St. 164, 23 Atl. 1058; Heath v. Blake, 28 S. C. 406, 5 S. E. 842; McDaniell v. Whitsett, 96 Tenn. 10, 33 S. W. 567; McVey v. Ely, 5 Lea, 438; Fow v. First Nat. Bank (Tex.), 34 S. W. 684; Otto v. Half, 89 Tex. 384, 59 Am. St. Rep. 56, 34 S. W. 910; Angle v. North Western Mut. Life Ins. Co., 92 U. S. 330; Hirschfield v. Smith, L. R. 1 Com. P. 340; Hirschman v. Budd, L. R. 8 Ex. 171. The few cases in this country which would seem to incline to an opposite view will be found on closer examination to have the value of dicta only (nearly all being cases where the alteration was immaterial or by a stranger) or they will appear to be founded upon the peculiar doctrine of the Maine and Massachusetts courts, which has already been noticed and which refers to the addition of an attestation to a writing when there is no actual fraud: See Barrett v. Thorndike, 1 Me. 73; Croswell v. Labree, 81 Me. 44, 10-

Am. St. Rep. 238, 16 Atl. 331; Thornton v. Appleton, 29 Me. 298; Bridges v. Winters, 42 Miss. 135, 97 Am. Dec. 443; Bowers v. Jewell, 2 N. H. 543; Clute v. Small, 17 Wend. 238; Van Brunt v. Eoff, 35 Barb. 501. See also *supra*, p. 95.

b. Must be Intent to Alter.

1. Addition of Memoranda, Separate Contracts, etc.—The general rule undoubtedly is as above stated, and a fraudulent intent cannot make an immaterial alteration of any effect, nor can an honest purpose render a material alteration of no effect. But this is to be carefully distinguished from that class of cases in which there was no intent, fraudulent or otherwise, to alter the instrument, but merely to make a memorandum upon it, or to evidence another and a separate contract upon the same paper. In such case, the memorandum is not an alteration at all and the decisions are uniform to the effect that such an addition does not avoid the note or other instrument at all. Whatever the motive there must be an intent to alter—to change—the instrument, and an intent to merely make a memorandum is not at all the same. The criterion is whether or not the intent was to change the effect of the instrument. If it was not, the addition is a mere memorandum and of no effect. If, however, such intent was present, no matter how honest the motives prompting it may have been, what would otherwise be a mere alteration becomes an alteration of the instrument, whether written in the body of the former writing or in a corner or on the back: *Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946. If the additions are in red ink or in pencil, they were probably, of course, intended not as forming a part of the contract, but as mere memoranda: *Maness v. Henry*, 96 Ala. 454, 11 South. 410; *Carr v. Welch*, 46 Ill. 88; *Light v. Killinger*, 16 Ind. App. 102, 59 Am. St. Rep. 313, 44 N. E. 760; *Johnson v. Parker*, 86 Mo. App. 660; *Chase v. Washington Mut. Ins. Co.*, 12 Barb. 595; *Yost v. Watertown etc. Co. (Tex.)*, 24 S. W. 657. And see in addition to these cases the following to the effect that the addition of a memorandum is not an alteration: *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Current v. Fulton*, 10 Ind. App. 617, 38 N. E. 419; *Horton v. Horton*, 71 Iowa, 448, 32 N. W. 452; *Jackson v. Boyles*, 64 Iowa, 428, 20 N. W. 746; *Nazeo v. Fuller*, 24 Wend. 374; *Woodworth v. Bank of America*, 19 Johns. 391, 10 Am. Dec. 239; *Littlefield v. Coombs*, 71 Me. 110; *Granite Ry. Co. v. Bacon*, 32 Mass. 239; *Bachelor v. Priest*, 29 Mass. 399; *American Nat. Bank v. Bangs*, 42 Mo. 450, 97 Am. Dec. 349; *Oliver v. Hawley*, 5 Neb. 439; *Morrill v. Otis*, 12 N. H. 466; *Hubbard v. Williamson*, 27 N. C. 397; *Kinard v. Glenn*, 29 S. C. 590, 8 S. E. 203; *Williams v. Waring*, 10 Barn. & C. 2.

The same rule applies where a new contract is written upon an instrument which already contains one contract. If such added

contract was intended to change the old, it is an alteration of the latter and, if material, will avoid it. Where, however, it is an independent collateral agreement, it is not an alteration of the old contract, and has no more effect upon it than if written on a separate piece of paper: *Huff v. Cole*, 45 Ind. 300; *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193; *Burnham v. Gosnell*, 47 Mo. App. 637; *Moore v. Macon Sav. Bank*, 22 Mo. App. 684; *Hutches v. J. I. Case Threshing Machine Co. (Tex.)*, 35 S. W. 60.

2. **Accidental Alterations.**—It is everywhere recognized that an alteration by accident is of no effect. This is, strictly speaking, not an exception to the general rule at all, there being no intention to alter present. The most frequent case is where a party, intending to sign in one part of the paper, accidentally signs in another, or where, intending to attest one signature only, he accidentally signs an attestation of more. In such a case there is no alteration of the instrument within the legal meaning of that term: *Lynch v. Hicks*, 80 Ga. 200, 4 S. E. 255; *Brett v. Marston*, 45 Me. 401; *Nelson v. Johnson*, 18 Ind. 329; *Cason v. Wallace*, 67 Ky. 888; *Hilton v. Houghton*, 35 Me. 143; *Rollins v. Bartlett*, 20 Me. 319; *Fisher v. King*, 153 Pa. St. 3, 25 Atl. 1029; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 12 Sup. Ct. Rep. 657. Another class of cases commonly placed by the courts under the head of accidental alterations are those in which an instrument has been mutilated by a child. These cases, however, might, it seems, be placed upon the more solid ground that the act was the act of a stranger, and amounted to no more than a spoliation of the instrument: *Frazier v. Boss*, 66 Ind. 1; *Rhoads v. Frederick*, 8 Watts, 448.

c. **When Made to Correct Mistake or to Conform Instrument to Intent of Parties.**—The group of cases which gives rise to the greatest conflict, however, is that in which the alteration was made to correct a mistake, or to conform the instrument to the intention of the parties. And upon this question the courts are fairly divided. One line of authorities holds that it is perfectly permissible for a party to an instrument to correct a mistake therein and to so alter the writing that it shall the more truly represent the agreement of the parties. Others, upon the other hand, realizing the danger of permitting any tampering with a written instrument, flatly deny the right of any one party to a contract, without the consent of the others, to alter the instrument in what he believes to be a mistaken portion, or to conform it to what he believes the parties have intended. Those cases which hold such alterations to be immaterial proceed upon the ground that the holder is impliedly authorized to make the alteration. Such an authorization, if implied, is certainly fictitious, and is repudiated by the cases holding that such alteration vitiates the instrument. "If mistakes do arise in the preparation of written instruments," says Sherwood, J.,

in *Evans v. Foreman*, 60 Mo. 449, "aside from the consent of all parties interested to the needed correction, the courts of the country alone can furnish adequate redress; and we will not give sanction or countenance to the attempts of an interested party to effect by his own hand the desired reformation, as an honest blunder of this sort, if upheld in one instance, might necessitate sanctioning an alteration having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise." And this is the doctrine of the states of Illinois, Iowa, Maine, Missouri, Nebraska, Ohio, Pennsylvania, Tennessee and Virginia: See *Kelly v. Trumble*, 74 Ill. 428; *Hayes v. Wagner*, 89 Ill. App. 390; contra, *Chamberlin v. White*, 79 Ill. 549; *Ryan v. First Nat. Bank*, 148 Ill. 349, 35 N. E. 1120; *Murray v. Graham*, 29 Iowa, 520; *Chadwick v. Eastman*, 53 Me. 12. Contra, *Hervey v. Harvey*, 15 Me. 357; *Evans v. Foreman*, 60 Mo. 449; *First Nat. Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397; contra, *State v. Dean*, 40 Mo. 464; *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369; *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep. 705, 43 N. E. 683; contra, *Jessup v. Dennison*, 2 Disn. 150; *Miller v. Gilleland*, 19 Pa. St. 119; *Taylor v. Taylor*, 80 Tenn. 714; *Dobyns v. Rawley*, 76 Va. 537. Holding a contrary view are the courts of England and of the states of Alabama, Arkansas, California, Connecticut, Georgia, Indiana, Massachusetts, Michigan, Mississippi, New York, Utah, and Wyoming: See *Tubb v. Madding, Minor*, 29; *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; *Inglish v. Bremen*, 5 Ark. 377, 41 Am. Dec. 96; *Sill v. Reese*, 47 Cal. 294; *Nichols v. Johnson*, 10 Conn. 192; *Hanson v. Crowley*, 41 Ga. 303; *Busjahn v. McLean*, 3 Ind. App. 281, 29 N. E. 494; *Produce Exchange Trust Co. v. Breberbach*, 176 Mass. 577, 58 N. E. 162; *Ames v. Colburn*, 11 Gray, 390, 71 Am. Dec. 723; *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52; *Johnson v. Johnson*, 66 Mich. 525, 33 N. W. 413; *McRaven v. Crisler*, 53 Miss. 542; *Connor v. Routh*, 7 How. 176, 40 Am. Dec. 59; *Foote v. Hambrick*, 70 Miss. 157, 35 Am. St. Rep. 631, 11 South. 567; *Domestic Sewing Machine Co. v. Barry*, 2 Misc. Rep. 264, 21 N. Y. Supp. 970; *Flint v. Craig*, 59 Barb. 319; *Booth v. Powers*, 56 N. Y. 22; *McClure v. Little*, 15 Utah, 379, 62 Am. St. Rep. 938, 49 Pac. 298; *McLaughlin v. Venine*, 2 Wyo. 1; *Buett v. Picard*, *Ryan & M.* 37; *Kershaw v. Cox*, 3 Esp. 246. On principle, the rule that no such alteration by a party is permissible would seem to be preferable, and more in harmony with the general principle that the motive of the party making the alteration is of no consequence.

VI. Effect of Alteration Upon Rights of Parties.

a. **General Rule.**—The effect of an unauthorized and material alteration of an instrument by a party thereto is to vitiate that instrument so that no recovery may afterward be had upon it. To produce this effect it is not necessary that there be any actual

fraud, nor that any party be actually injured by the alteration. This rule is so well established as to require no citation of authorities. There are, however, various questions connected with the effect of alterations of instruments, which arise from peculiar states of facts, and to which the general rule can give no satisfactory answer. Moreover, the general rule has reference only to the effect of an unauthorized alteration upon the instrument itself, without regard to whether recovery may still be had upon the original consideration for which the instrument was given.

b. **Where Instrument is in Duplicate.**—Where an instrument is executed in duplicate, and one copy is intrusted to each of the parties to the contract, there arises the interesting question, as to the effect of the alteration of one copy upon the other duplicate. In such case it is held that both instruments are originals, and that the alteration of one cannot destroy the validity or binding effect of the other, which still remains as the evidence of the contract of the parties: *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Jones v. Hoard*, 59 Ark. 42, 43 Am. St. Rep. 17, 26 S. W. 193. In *Jones v. Hoard*, 59 Ark. 42, 43 Am. St. Rep. 17, 26 S. W. 193, the alteration was apparently fraudulent, and yet it was held that the right of action on the other instrument was not thereby avoided. This is carrying the doctrine, it would seem, to an unwarranted extent (*Hayes v. Wagner*, 89 Ill. App. 391), for by the great weight of authority the alteration, if fraudulent, destroys the right of action on the original consideration, and the other duplicate, though untouched, would be useless as evidence.

c. **Where Instrument is Restored to Its Original Condition.**—An even more interesting question arises in cases where, although there has been a material alteration of the instrument, it was made without fraud, and the instrument has since been restored to its original condition. Where the alteration is fraudulent, there can, of course, be no question. Such an alteration destroys not only the instrument, but by the weight of authority, the original consideration as well, and no subsequent restoration of the instrument can restore its validity: *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567. The difficult case is that in which the original alteration was made under a mistake of fact, or without fraudulent intent, and it has subsequently been restored, and as to such a case the authorities are in quite substantial conflict. In all of the states in which it is held that an alteration made to correct a mistake or to conform the instrument to the intention of the parties is of no effect, there can be no question that the restoration of the instrument to its original condition will not avoid the liability of the parties on it. In some states a distinction is attempted between those cases in which the restoration is by the party who made the alteration and before the instrument leaves his hands, and those cases in which a restoration is attempted after the party who made the alteration has

parted with the instrument: *Shepard v. Whetstone*, 51 Iowa, 457, 33 Am. Rep. 143, 1 N. W. 753. This distinction is not, however, generally recognized, nor do the courts usually inquire by whom the restoration was attempted. "An obligation, once destroyed, cannot, in the nature of things, be resuscitated without the consent of the obligor. It must be done by a new contract to which the obligor is a party": *Cotton v. Edwards*, 32 Ky. 106; *Warpole v. Ellison*, 4 Houst. 322; *Waterman v. Vose*, 43 Me. 504; *Martendale v. Follet*, 1 N. H. 95; *Smith, J.*, dissenting in *McAlpin v. Clark*, 11 Ohio C. C. 524. The weight of authority, however, seems opposed to this strict doctrine, and permits a recovery where the alteration was originally for no fraudulent purpose and the instrument has since been restored: *Rogers v. Shaw*, 59 Cal. 260; *Hayes v. Wagner*, 89 Ill. App. 390; *Newton v. Bramlett*, 55 Ill. App. 661; *Swigart v. Weare*, 37 Ill. App. 258; *Horst v. Wagner*, 43 Iowa, 373, 22 Am. Rep. 255; *Shepard v. Whetstone*, 51 Iowa, 457, 33 Am. Rep. 143, 1 N. W. 753; *Nevins v. De Grand*, 15 Mass. 436; *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; *Nickerson v. Swett*, 135 Mass. 514; *Russell v. Longmoor*, 29 Neb. 209, 45 N. W. 624; *McAlpin v. Clark*, 11 Ohio C. C. 524; *Seymour v. Mickey*, 15 Ohio St. 515; *Wallace v. Tice*, 32 Or. 283, 51 Pac. 733; *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541; *Skelton v. Tillman (Tex.)*, 20 S. W. 71.

While the latter rule is undoubtedly more conformable to the justice of the case than is the harsher rule, which holds such restoration of no effect, the reasons urged in its support are by no means as satisfactory. On principle, it is difficult to see how an instrument which has been rendered null and void can be restored to validity by any act of attempted restoration. It is well settled that an alteration, whether fraudulent or not, avoids the instrument, and that not only can no action be maintained upon it in its altered condition, but that none can be maintained upon it as it originally was. What difference, then, can it make that the instrument has been again restored to such original condition? Any doctrine which gives effect to the instrument as restored must, it seems, attribute to the mere act of physical restoration of it an effect not at all warranted by the general principles underlying the law as to the alteration of writings.

d. Where Negligence of Maker has Facilitated the Alteration.— In many cases the maker of an instrument has rendered easy the alteration of it, so that the alteration will not excite suspicion; and the question at once arises whether, by thus facilitating the alteration of an instrument, its maker shall not be precluded from setting up the defense of alteration where an innocent third party has taken the instrument so altered. The most frequent cases in which alteration is thus made easy are those in which the maker has executed an instrument leaving sufficient blank space between the words of it so that other words or figures may easily be inserted, and those

in which he has executed an instrument so arranged that one material portion may be easily detached without exciting suspicion. And whether, in such cases, the defense of alteration is permissible, when the maker is sued by an innocent third party, is a question upon which the courts are squarely divided. The entire difficulty seems to have grown out of the case of *Young v. Grote*, 4 Bing. 253. In that case a husband, having occasion to leave home for a short time, left certain blank checks upon his banker with his wife, directing her to fill them with such sums as might be required in his business. She directed a clerk employed by the husband to fill certain checks with amounts necessary to pay the wages of some employes. This the clerk did, but left sufficient blank space so that after showing the checks to his employer's wife, he might easily raise them, which he afterward did. The bank, having paid the checks in good faith, was held not liable to a claim by the husband.

This case of *Young v. Grote*, 4 Bing. 253, has ever since its decision been something of a thorn in the sides of the English judges, who, while upholding the result, have assigned various reasons for the decision. In the case itself, recovery was denied the husband on the ground that the negligence of himself and agent had deceived the banker. In *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389, *Young v. Grote*, 4 Bing. 253, was placed upon the ground of estoppel; in *Swan v. North British Australasian Co.*, 2 Hurl. & C. 175, Cockburn, C. J., thought that the case was decided on the principle of avoiding a circuity of action; and finally, in *Baxendale v. Bennett*, L. R. 3 Q. B. D. 525, the case was discredited as an authority.

Young v. Grote, 4 Bing. 253, is, however, not a case in which an altered instrument was sued upon, but is an action between a banker and his customer, wherein the negligence of the customer has, at least, aided the deception of the banker: *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67.

Whether or not *Young v. Grote*, 4 Bing. 253, is here applicable, it has given rise to a line of cases which holds that where the maker has, by leaving blank spaces, or by any other means, facilitated the deception of an innocent third party, he cannot be heard to complain of the alteration: *Holmes v. Bank of Fort Gaines*, 120 Ala. 493, 24 South. 959; *Mater v. American Nat. Bank*, 8 Colo. App. 325, 46 Pac. 221; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Noll v. Smith*, 64 Ind. 511, 31 Am. Rep. 131; *Blakey v. Johnson*, 13 Bush, 197, 26 Am. Rep. 254; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *Garrard v. Haddan*, 67 Pa. St. 82, 5 Am. Rep. 412; contra, *Worall v. Gheen*, 39 Pa. St. 388; *Brown v. Reed*, 79 Pa. St. 370, 21 Am. Rep. 75; *Leas v. Walls*, 101 Pa. St. 57, 47 Am. Rep. 699; *Hoffman v. Planters' Nat. Bank*, 99 Va. 480, 39 S. E. 134. Various reasons are assigned for these decisions: 1. That the maker has in-

duced another to act upon the paper as having the effect that its face indicated; 2. Another reason is that of estoppel—that the maker is estopped to allege that the instrument is altered; 3. That where two innocent parties must suffer by the fault of a third, he shall sustain the loss who rendered its occasion possible; 4. That the maker of commercial paper owes a duty to the public to guard against frauds and alterations by refusing to sign negotiable paper which may be easily altered without detection; 5. That the doctrine of negotiability requires free exchange of negotiable paper. These are, however, taken up and answered in *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892, and each is shown to be inapplicable. The most frequently urged of all grounds—that of negligence on the part of the maker—is answered in *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, by the principle that no negligence can be considered the proximate cause of a result which it required a criminal act on the part of another person to effect. And the rule of the two cases last mentioned would seem to be the correct one: *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 491; *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Simmons v. Atkinson etc. Co.*, 69 Miss. 862, 12 South. 263; *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881; *Searles v. Seipp*, 6 S. Dak. 472, 61 N. W. 804. In *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382, it was even held that the separation of a note from a stub on which was written a condition avoided the note, the court saying: "That the stub could be easily separated from the note can make no difference, as no rule of law required the maker to anticipate that the payee would commit a felony by the alteration.

e. Effect of Bona Fides of Purchaser of Altered Instrument.— In cases in which the defense of alteration is set up by the maker of an instrument sued upon, it is frequently sought to avoid such defense by proof that the plaintiff is a bona fide holder who took without knowledge of the alteration or of any facts sufficient to put him upon the path of inquiry. By the overwhelming weight of authority, however, the bona fides of the holder is of no consequence: *Fontaine v. Gunter*, 31 Ala. 264; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Chariton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022; *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059; *Belknap v. National Bank*, 100 Mass. 376, 97 Am. Dec. 105; *Bradley v. Mann*, 37 Mich. 1; *Coles v. Yorks*, 28 Minn. 464, 10 N. W. 775; *Washington Sav. Bank v. Ecky*, 51 Mo. 272; *Erickson v. First Nat. Bank*, 44 Neb. 622, 48 Am. St. Rep. 753, 62 N. W. 1078; *Young v.*

Currie, 63 N. H. 419; Benedict v. Cowden, 49 N. Y. 396, 10 Am. Rep. 382; Newman v. King, 54 Ohio St. 273, 56 Am. St. Rep. 705, 43 N. E. 683; Miller v. Gilleland, 19 Pa. St. 119; Gettysburg Nat. Bank v. Chisholm, 169 Pa. St. 564, 47 Am. St. Rep. 29, 32 Atl. 730. The only cases contra are believed to be Worrall v. Gheen, 89 Pa. St. 388, Wills v. Wilson, 3 Or. 308, and Pope v. Branch County Bank, 23 Ind. App. 210, 54 N. E. 835, and these are plainly erroneous.

f. **Effect of Alteration Upon Right of Action on Original Consideration.**—In determining whether an instrument is avoided by a material alteration, the intent or motive of the party can have but little play. In the consideration, however, of the effect of such an alteration upon the original debt for which the instrument was given, the motives which prompted the change are of the greatest moment. If the alteration was fraudulent, it reaches not only the instrument, but the original consideration as well, and prevents recovery upon either: White v. Hass, 32 Ala. 430, 70 Am. Dec. 548; Glover v. Robbins, 49 Ala. 219, 20 Am. Rep. 272; Lewis v. Shepherd, 1 Mackey (D. C.), 46; Armstrong v. Penn, 105 Ga. 229, 31 S. E. 158; Kingan v. Silvers, 13 Ind. App. 80, 37 N. E. 413; Woodworth v. Anderson, 63 Iowa, 503, 19 N. W. 296; Wheelock v. Freeman, 13 Pick. 165, 23 Am. Dec. 674; Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Warder etc. Co. v. Willyard, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300; Low v. Crawford, 67 Mo. App. 150; Martendale v. Follet, 1 N. H. 95; Lewis v. Schenck, 18 N. J. Eq. 459, 90 Am. Dec. 631; Kennedy v. Crandall, 3 Lans. 1; Trow v. Glen Cove Starch Co., 1 Daly, 80; Meyer v. Huneke, 55 N. Y. 412; Sykes v. Gerber, 98 Pa. St. 179; Mills v. Starr, 2 Ball. 359. The rule that an alteration vitiates an instrument, being a rule founded in public policy and for the prevention of fraud, it is said that "if a party guilty of the fraud may found a claim upon the original consideration, the rule itself would be defeated." To allow parties to take the chances of success in fraudulently dealing with the written obligations of those with whom they contract without risk of loss in case of detection, would be an encouragement, rather than a discouragement to this description of fraud: Meyer v. Huneke, 53 N. Y. 412.

Where, however, the alteration was made without a fraudulent intent, but in the correction of a mistake, etc., the reason for such a rule ceases, and it is well settled that such alteration does not preclude the party from recovering on the original consideration: Green v. Sneed, 101 Ala. 205, 46 Am. St. Rep. 119, 13 South. 277; Warren v. Layton, 3 Harr. (Del.) 404; Hayes v. Wagner, 89 Ill. App. 390; Soaps v. Eichberg, 42 Ill. App. 375; Kelly v. Trumble, 74 Ill. 428; Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298; Sullivan v. Rudisill, 63 Iowa, 158, 18 N. W. 856; Murray v. Graham, 29 Iowa, 520; Hervey v. Harvey, 15 Me. 357; Owen v. Hall, 70 Md. 97, 16 Atl. 376; Morrison v. Welty, 18 Md. 169; Wilson v. Hayes, 40 Minn. 531, 12 Am. St.

Rep. 754, 42 N. W. 46; Kirne v. Jesse, 52 Neb. 606, 72 N. W. 1050; State Sav. Bank v. Shaffer, 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Clute v. Small, 17 Wend. 238; Booth v. Powers, 56 N. Y. 22; Hampton v. Mayes (Ind. Ter.), 53 S. W. 483; Wallace v. Tice, 32 Or. 283, 51 Pac. 733; Miller v. Stark, 148 Pa. St. 164, 23 Atl. 1058; Babb v. Clemson, 10 Serg. & R. 419, 13 Am. Dec. 684; Keene v. Weeks, 19 R. I. 309, 33 Atl. 446; Otto v. Halff, 89 Tex. 384, 59 Am. St. Rep. 56, 34 S. W. 910; Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766; Sutton v. Toomer, 7 Barn. & C. 416; Atkinson v. Hawden, 2 Ad. & E. 628.

g. Effect Upon Mortgage of Alteration of Note.—Following out this principle, it is held that where a note is secured by a mortgage, if the note is fraudulently altered, no recovery will be permitted upon either the note or mortgage. But if the alteration of the note was without fraudulent intent, it will vitiate only the instrument altered and the mortgage still remains a valid security for the original consideration: Vogle v. Ripper, 34 Ill. 100 85 Am. Dec. 298; Clough v. Seay, 49 Iowa, 111; Cheek v. Nall, 112 N. C. 370, 17 S. E. 80; Smith v. Smith, 27 S. C. 166, 13 Am. St. Rep. 633; Plyler v. Elliott, 19 S. C. 257; Heath v. Blake, 28 S. C. 406, 5 S. E. 842; Gillet v. Powell, Spear Eq. 142. It is held in Indiana that since a promissory note is, in that state, prima facie payment of the debt, any alteration of a note which has the effect of discharging it discharges the mortgage also: Tate v. Fletcher, 77 Ind. 102; Bowman v. Mitchell, 79 Ind. 84. But this doctrine is denied in Massachusetts, where the same view of a promissory note obtains, and is probably not correct on principle: Jeffrey v. Rosenfeld (Mass., Sept. 7, 1901), 61 N. E. 49.

h. Right to Recover Money Paid Upon Altered Instrument.—Where money has been paid on a raised or otherwise altered instrument, without knowledge of the alteration, the general principles applicable in cases where money is paid under a mistake of fact govern, and such money may ordinarily be recovered back: Fraker v. Little, 24 Kan. 598, 36 Am. Rep. 362; National Bank of Commerce v. National Mechanic's Banking Assn., 55 N. Y. 211, 14 Am. Rep. 232; contra, First Nat. Bank of Decorah v. Laughlin, 4 N. Dak. 391, 61 N. W. 473. And this is in general true, whether or not the party making the payment was negligent in so doing, unless the position of the other party has been so changed by the payment that to compel him to refund would be inequitable: National Bank of Commerce v. National Banking Assn., 55 N. Y. 211, 14 Am. Rep. 232. To this there are, however, two well-settled exceptions: 1. That a bank paying a bill of its own, in ignorance of the fact that its amount has been raised, cannot recover the amount so paid from a bona fide holder: United States Bank v. Bank of Georgia, 10 Wheat. 333; 2. That a drawee is bound to know his drawer's signature, and cannot recover from a bona fide holder money paid in

ignorance of the fact that the drawer's signature was forged: *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *Commercial etc. Nat. Bank v. First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554; *Mackintosh v. Elliot Nat. Bank*, 123 Mass. 393; *First Nat. Bank v. State Bank*, 22 Neb. 769, 3 Am. St. Rep. 294, 36 N. W. 289; *Star etc. Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Price v. Neal*, 3 Burr. 1355. This latter exception, though disapproved by many text writers, who would limit its application to cases where the draft has been taken by the holder on the faith of the drawee's acceptance, is the undoubted law. Its operation is, however, confined to cases of forgery of the drawer's signature, and does not apply to cases of the alteration of any other part of the bill of exchange. The drawee is not bound to know the handwriting in the body of the instrument, and money paid in ignorance of an alteration therein can be recovered by the payor: *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102; *Third Nat. Bank of St. Louis v. Allen*, 59 Mo. 310; *National Park Bank v. Ninth Nat. Bank*, 55 Barb. 87; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *National City Bank of Brooklyn v. Westcott*, 118 N. Y. 468, 16 Am. St. Rep. 771, 23 N. E. 900; *National etc. Bank v. Seaboard Bank*, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Hall v. Fuller*, 5 Barn. & C. 750; contra, *Dunbar v. Armor*, 5 Rob. (La.) 1, 39 Am. Dec. 528. See generally on this subject the note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 884.

I. Where Instrument was an Executed Contract or Conveyance.

1. **Upon Title Vested Under It.**—The general rule as to the effects of the alteration of an instrument is confined to such as are executory. Where, therefore, an instrument has fully accomplished the purpose for which it was executed before the alteration was made, and the paper remains merely as the evidence of an executed transaction, and is but a memorial of it, the rights or the title vested by the operation of the instrument before its alteration cannot be divested by a subsequent alteration. Thus, even the cancellation of a deed, under which title has passed will not serve to divest the grantee of the title already vested. And this doctrine, early recognized by the courts of England (*Coke on Littleton*, 2256, note 136; *Bolton v. Bishop of Carlisle*, 2 H. Black. 263), has been followed in this country in numerous cases: *Alabama etc. Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440; *Sharpe v. Orme*, 61 Ala. 263; *Abbot v. Abbot*, 189 Ill. 488, 82 Am. St. Rep. 470, 59 N. E. 958; *Fletcher v. Mansur*, 5 Ind. 267; *Ransier v. Vandersdal*, 50 Iowa, 130; *Hollingsworth v. Holbrook*, 80 Iowa, 151, 20

Am. St. Rep. 411, 45 N. W. 561; *Barrett v. Thorndike*, 1 Me. 73; *Chessman v. Whittemore*, 40 Mass. 231; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078; *Woods v. Hildebrand*, 46 Mo. 284, 2 Am. Rep. 513; *Chesley v. Frost*, 1 N. H. 145; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299; *Respas v. Jones*, 102 N. C. 5, 8 S. E. 770; *Miller v. Gilleland*, 19 Pa. St. 119; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569; *North v. Henneberry*, 44 Wis. 306.

2. **Upon Executory Covenants.**—But even in the case of an instrument of conveyance, a material alteration will destroy all right of action dependent upon its executory covenants. As to them the general rule is applicable in all its force, and any rights which are dependent upon the continued validity of an executory covenant in an instrument, other covenants of which are executed, will be lost by the material alteration of such instrument. Thus, where the right of the mortgagee to take possession is dependent upon the covenants of a mortgage, that right will be lost by the alteration of the instrument: *Hollingsworth v. Holbrook*, 80 Iowa, 151, 20 Am. St. Rep. 411, 45 N. W. 561; *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078. And where an estate such as a rent charge can exist only by deed, the fraudulent alteration of the deed by the holder destroys the estate: *Lewis v. Payne*, 8 Cow. 71, 18 Am. Dec. 427; *Chesley v. Frost*, 1 N. H. 145. And where either the right to retain possession of, or to preclude the lessor from entering, premises is dependent upon the continuance of the covenants in a lease, these rights are lost by an alteration of the instrument: *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165.

3. **Upon Instrument as Evidence of Vested Title or a Collateral Fact.**—Growing out of this rule that the alteration of an instrument of conveyance does not divest title once vested by reason of it, but does destroy the validity of the instrument, so far as any action upon its executory covenants is concerned, there is the much mooted question as to the effect of such alteration upon the deed as evidence of the title which passed by it in its original form. One line of cases is to the effect that although no right of action remains upon the executory covenants of a deed altered in a material part, the deed may nevertheless be given in evidence in support of the title derived under it, and which the alteration of the deed has not affected. In *Insurance Co. v. Fitzgerald*, 16 Ad. & E., N. S., 432, Lord Campbell, C. J. said: "There is no ground for saying that if a deed be altered in a material part, it is rendered void from the beginning. It ceases to have any new operation; and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having

been executed, or to prove any collateral fact": *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Doe v. Hirst*, 8 Stark. 60; *Hutchins v. Scott*, 2 Mees. & W. 809; *Davidson v. Cooper*, 11 Mees. & W. 778. Taking the opposite view, and holding such a deed inadmissible as evidence to show either the title which passed by it, or a collateral fact, are the cases of *Chesley v. Frost*, 1 N. H. 145; *Withers v. Atkinson*, 1 Watts. 236; *Newell v. Mayberry*, 8 Leigh, 250, 23 Am. Dec. 261; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165. On principle, the former doctrine seems the sounder of the two; and the reasons in its favor as given by McClellan, J., in *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440, are apparently conclusive. "All authorities agree that title does pass and is not divested by the subsequent alteration. All authorities agree, also, that, notwithstanding the unauthorized erasures or interlineations, it is open to the grantee named in the paper to show, by any competent evidence, the passing of title into him. In other words, he may and must show that a deed conveying the land to him was executed by the grantor named in the altered paper; he must prove the execution and contents of a deed, and this, of course, by the best evidence the case admits of. He cannot resort to parol evidence to prove the contents of a paper, which has not been lost or physically destroyed, but, on the contrary, is then in his possession, and in court. The paper itself, regardless of a signature to it, would be the best evidence of its contents. . . . It is upon him to prove a deed as that deed existed a moment after its execution was completed by delivery to him. . . . Could there possibly be any better, or, indeed, any other competent, evidence of the contents of such a deed than the deed itself, or of its execution, than the statutory acknowledgment appended to it? We think not."

VII. Ratification of Alteration.

Whatever doubt there may be as to the general question whether or not a forgery is capable of being ratified (see *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467), it is no longer doubted that a material alteration of an instrument may be ratified by the party sought to be charged upon the instrument. In such case the effect upon the rights of the parties is the same as though the alteration had originally been authorized: *Dickson v. Bamberger*, 107 Ala. 293, 18 South. 290; *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498; *Black v. Bowman*, 15 Ill. App. 166; *Benedict v. Miner*, 58 Ill. 19; *Gardiner v. Harback*, 21 Ill. 129; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331; *Perkins Windmill etc. Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098; *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692; *Humphreys v. Gullow*, 12 N. H. 385, 38 Am. Dec. 499; *Booth v. Powers*, 56 N. Y. 22; *Boalt v. Broom*, 18 Ohio St. 364; *Chezum v. McBride*, 21 Wash. 558, 58 Pac.

1067; *Piercy v. Piercy*, 5 W. Va. 199; *Davis v. Shafer*, 50 Fed. 764. The principles governing ratification generally are here applicable. Thus, the ratification must be with knowledge of all the facts: *Cutler v. Rose*, 35 Iowa, 456; *Benedict v. Miner*, 58 Ill. 19; *Perkins Windmill etc. Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098; *Boalt v. Brown*, 13 Ohio St. 364; *Bell v. Gardiner*, 11 L. J. Com. P. 195. And what constitutes ratification is dependent entirely upon the facts of each case. The following have been held a sufficient ratification of an alteration which was unauthorized when made: Where with knowledge of the alteration the party agreed to pay the amount of the instrument: *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498; *Humphreys v. Guillow*, 18 N. H. 385, 38 Am. Dec. 499; *Prouty v. Wilson*, 123 Mass. 297. Receiving indemnity from the principal debtor with full knowledge of the alteration is a ratification of it by the sureties: *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692. Suing on the instrument as altered where plaintiff has knowledge of the alteration is held a ratification in *Perkins Windmill etc. Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098. Mere failure to object when informed of the alteration is not of itself a ratification: *German Bank v. Dunn*, 62 Mo. 79. And, in general, what constitutes a ratification is for the court and not for the jury: *Dickson v. Bamberger*, 107 Ala. 298, 18 South. 290. On the point of ratification and what constitutes it, each case stands upon its own facts, and the law relating to it belongs more properly to the subject of agency than to that of the alteration of instruments. The rules applicable generally where a ratification is sought to be established govern here, and the single point peculiar to the law of alteration of instruments is that an alteration, though amounting in law to a forgery, may be ratified: *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467.

VIII. Province of Court and Jury.

Upon the question of what is a question of law and what a question of fact where the alteration of writings is involved, the authorities are quite harmonious, and in general the province of court and of jury is well defined. Whether or not an alteration is material is uniformly held to be a question for the court. The materiality of an alteration is, of course, dependent upon the change it would effect with reference to the legal rights of the parties, and this is obviously a question of law: *Brown v. Johnson*, 127 Ala. 292, 85 Am. St. Rep. 134, 28 South. 579; *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498; *Milliken v. Marlin*, 66 Ill. 13; *Cochran v. Nebeker*, 48 Ind. 459; *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406; *Love v. Shoape*, 1 Miss. 508; *State v. Dean*, 40 Mo. 464; *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479; *Oliver v. Hawley*, 5 Neb. 439; *Burnham v. Ayer*, 35 N. H. 351; *Bowers v. Jewell*, 2 N. H. 543; *Chappell v. Spencer*, 23 Barb. 584; *Stephens v. Graham*, 7 Serg. & R. 505, 10 Am. Dec. 485; *Keen v. Monroe*, 75 Va. 424; *Newell v.*

Mayberry, 3 Leigh, 250, 23 Am. Dec. 261; Wood v. Steele, 6 Wall. 80; Vance v. Lowther, L. R. 1 Ex. D. 176. And in those jurisdictions in which certain presumptions arise from an alteration which is apparent on the face of an instrument, it is for the court to say whether an alteration is apparent or not: Ives v. Farmers' Bank, 2 Allen, 236. Whether there was in fact an alteration of the instrument is always a question for the jury. And when the person by whom, the time when, or the intent with which, an admitted alteration was made is drawn into question, it is for the jury to say whether it was by a party to the instrument or by a stranger, whether before or after execution, and whether with an honest or a fraudulent purpose. In various jurisdictions, different presumptions are said to exist as to these questions of fact, dependent upon the appearance of the instrument when offered in evidence. But in all of these jurisdictions such presumptions are disputable only, and the question is in the end one for the jury to consider in the light of all the evidence, intrinsic or extrinsic: Sharpe v. Orme, 61 Ala. 263; Chapman v. Sargent, 6 Colo. App. 438, 40 Pac. 849; Bailey v. Taylor, 11 Conn. 531, 29 Am. Dec. 321; Planters and Mechanics' Bank v. Erwin, 31 Ga. 371; Winkles v. Guenther, 98 Ga. 472, 25 S. E. 527; Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258; De Long v. Saucle, 45 Ill. App. 234; Wallace v. Wallace, 8 Ill. App. 69; Hagan v. Merchants' Ins. Co., 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Wilson v. Hayes, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467; McCormick v. Fitzmorris, 39 Mo. 24; McClintock v. State Bank, 52 Neb. 130, 71 N. W. 978; Stough v. Ogden, 49 Neb. 29, 68 N. W. 516; Hill v. Barnes, 11 N. H. 397; Boyd v. Brotherson, 10 Wend. 93; Kennedy v. Moore, 17 S. C. 464; Moddie v. Breeland, 9 S. Dak. 506, 70 N. W. 637; Beaman v. Russell, 20 Vt. 205, 49 Am. Dec. 775; Bliss v. McIntyre, 18 Vt. 466, 46 Am. Dec. 165; Connor v. Fleshman, 4 W. Va. 693.

IX. Burden of Proof and Presumptions.

a. Where Alteration is not Apparent.—Among the almost innumerable decisions, and the conflict of authorities upon the subject of the presumptions arising from alterations apparent upon the face of the instrument, there seems to be but one principle upon which the authorities are in harmony. This is, that where an alteration in an instrument is alleged to have been made, and such alteration is not apparent upon the face of the instrument, the burden of showing that the latter has been altered is upon the party who alleges it: Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498; Harris v. Bank of Jacksonville, 22 Fla. 501, 1 Am. St. Rep. 201; McClintock v. State Bank, 52 Neb. 130, 71 N. W. 978; Riley v. Riley, 9 N. Dak. 580, 84 N. W. 347; Gettysburgh Nat. Bank v. Gage, 4 Pa. Super. Ct. 505; Cosgrove v. Fanebust, 10 S. Dak. 213, 72 N. W. 469; Smith v. Parker (Tenn.), 49 S. W. 285; Kansas Mut. etc. Ins. Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S.

W. 388; First Nat. Bank v. Pritchard, 2 Willson (Tex.) Civ. Cas. Ct. App. 130; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 834; Sturm v. Boker, 150 U. S. 812, 14 Sup. Ct. Rep. 99.

b. Where Alteration is Apparent.

1. Presumption as to Time of Alteration.—This, however, seems to be the single note of harmony. Where the alteration is apparent the authorities are hopelessly divided as to the presumptions arising from such apparent alteration. Any attempt to reconcile them would be useless, and an accurate classification of their varying views is impossible. They seem to fall, however, into four general classes, each of which is representative of a view opposed to that of the others: 1. One line of cases holds that no presumption arises from an alteration apparent on the face of the instrument, but that the entire question of the time when the alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic; 2. Another holds that an alteration apparent on the face of the paper raises a presumption that it was made after execution and delivery; 3. A third line of authorities holds that the presumption that the alteration was made after execution arises only where the alteration or the facts surrounding it are suspicious; and finally, it is held by another group of courts: 4. That an alteration, apparent on the face of the paper is, without explanation, presumed to have been made before delivery. This classification of the authorities is, at best, approximate only, as many of the courts have taken compromise positions, holding the presumption to depend upon various matters, such as denial under oath that the paper was executed, the nature of the instrument, i. e., whether a specialty or not, etc.

1. The rule that no presumption as to the time when the instrument was altered arises from an alteration appearing on its face, would seem the only one maintainable upon principle, and has the support of a very lengthy line of authorities. Most of these cases are, however, weakened as authority for the rule itself by the limitations which they place upon it. Thus, while they hold that there is no presumption that the alteration was made either before or after execution of the instrument, they almost invariably add that such apparent alteration is in itself suspicious and requires explanation by the party offering the instrument in evidence. This limitation would seem to take from the rule urged by these cases nearly all of its practical value. For while, under this doctrine, it is not, perhaps, necessary to make an explanation of the alteration before the instrument is admissible in evidence, the practical result would seem to be the same, since once in evidence, the alteration would require explanation. This limitation is, however, recognized by nearly all of the cases upholding the doctrine that there is no presumption from an apparent erasure or interlineation: Warren v. Layton, 3 Harr. (Del.) 404; Pankey v. Mitchell, 1 Ill. 383; Gillett v. Sweat, 6 Ill. 475; Reed v. Kemp, 16 Ill. 445; Merritt v. Boyden, 191 Ill. 136,

85 Am. St. Rep. 246, 60 N. E. 907; Robinson v. State, 60 Ind. 26; Nell v. Case, 25 Kan. 510, 37 Am. Rep. 259; Adair v. Eglund, 58 Iowa, 314, 12 N. W. 277; Shepard v. Whetstone, 51 Iowa, 457, 33 Am. Rep. 143, 1 N. W. 753; Pipes v. Hardesty, 9 La. Ann. 152, 61 Am. Dec. 202; Eddy v. Bond, 19 Me. 461, 36 Am. Dec. 767; State v. Chick, 43 S. W. 829; Hoey v. Jarman, 39 N. J. L. 523; Marshall v. Wilhite, 2 O. C. D. (Ohio), 500; Dolph v. Barney, 5 Or. 191; Todd v. Lederach, 4 Pa. Dist. Rep. 173; Simpson v. Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554; Neff v. Horner, 63 Pa. St. 327, 3 Am. Rep. 555; Paine v. Edsell, 19 Pa. St. 180; Frey v. Wessner, 1 Woodw. Dec. 145; Clark v. Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307; Estate of Nagle, 134 Pa. St. 31, 19 Am. St. Rep. 669, 19 Atl. 434; Miller v. Reed, 27 Pa. St. 244, 67 Am. Dec. 459; Vaughan v. Fowler, 14 S. C. 355, 37 Am. Rep. 731; Wicker v. Pope, 12 Rich. 387, 75 Am. Dec. 732; Bullock v. Sprowles (Tex.), 54 S. W. 657; Piercy v. Piercy, 5 W. Va. 199. And in the courts which follow this doctrine, it is held that, even if suspicious, the alteration will not be presumed to have been made either before or after execution. In such case, the law presumes nothing, and leaves to the jury the entire question of the time when the alteration was made: Ward v. Cheney, 117 Ala. 238, 22 South. 996; Welch v. Coulborn, 3 Houst. (Del.) 647; Gillett v. Sweat, 6 Ill. 475; Paramore v. Lindsey, 63 Mo. 63; McCormick v. Fitzmorris, 39 Mo. 24; Wicker v. Pope, 12 Rich. 387, 75 Am. Dec. 732. In Pennsylvania, a distinction, based upon the English cases of Johnson v. Duke of Marlborough, 2 Stark. 313, Herman v. Dickinson, 5 Bing. 183, and Bishop v. Chambre, 3 Car. & P. 55, is made between alterations in negotiable instruments and those in other writings. These English cases are, however, based upon the English stamp act (Beaman v. Russel, 20 Vt. 205, 49 Am. Dec. 775), and the distinction is not generally recognized in America. In accordance with the general doctrine of these cases, it is held that the ordinary proof of due execution entitles an instrument to admission in evidence without any preliminary explanation of an alteration apparent thereon: Klein v. German Nat. Bank, 69 Ark. 140, post, p. 183, 61 S. W. 572; Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Stayner v. Joyce, 120 Ind. 99, 22 N. E. 89; Crabtree v. Clark, 20 Me. 337; Connor v. Fleshman, 4 W. Va. 693; Wolferman v. Bell, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017; Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 Pac. 834. This doctrine is well stated by the court in Cole v. Hills, 44 N. H. 227: "It seems to us that the proper rule is, that the instrument, with all the circumstances of its nature, its history, the appearance of the alteration, the possible or probable motives to the alteration, or against it, on the part of all the persons connected with it, or in whose possession it may have been, and the effect of the alteration upon the rights and obligations of the parties, respectively, ought to be submitted to the jury, who should find from all these whether the alteration was made before or after execution, and if after, whether it was with the as-

sent of the adverse party, and consequently, whether it rendered the instrument invalid or not. Whether the handwriting of the alteration is the same with the body of the instrument, whether it is the same with that of the signature, whether the ink is the same or different, whether, from the appearance, the body of the instrument and the alteration were written at the same time or at different times, whether the party claiming or the party sought to be charged is to be benefited by it, whether the alteration was made before or after execution, and if after, by whom, and for what purpose, are all questions of fact for the consideration of the jury. It could serve no good practical purpose for the court to go into these inquiries first, to determine whether a party has made a *prima facie* case. Upon the usual proof of the execution of the instrument, it should, without reference to the character of any alteration upon it, be admitted in evidence, leaving all testimony in relation to such alteration to be given to the jury, with proper instructions upon the facts in each case": Citing *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 821.

2. The second doctrine is that an unexplained alteration apparent upon the face of the instrument is presumed to be made after execution. These cases arise from a misconception of certain early English cases, based upon the stamp acts, and which were applicable only to negotiable instruments: *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775. In *Simpson v. Stackhouse*, 9 Pa. St. 186, 49 Am. Dec. 554, the cases were nevertheless said to be founded "in reason and not in considerations growing out of the stamp acts." Whatever may have been its origin, this harsh rule is certainly unsound on principle, and is but little followed. The law never presumes fraud, and it is, moreover, not only harsh, but opposed to general experience and modern commercial usage, to assume that all instruments are issued without erasure or blemish of any kind. In New Hampshire, and probably in New York, this would, however, seem to be the accepted doctrine: *Hill v. Barnes*, 11 N. H. 397; *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371; *Jackson v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649. See, however, *Smith v. McGowan*, 3 Barb. 404. In *Cole v. Hills*, 44 N. H. 227, the court, after a consideration of the rules in the various states, and after holding no preliminary explanation necessary, finally held that this presumption (that the alteration was after execution) was to be made only where the jury "could not find any preponderance of evidence as to when the alteration was made, or, if there is an entire absence of evidence and of circumstances both in the instrument itself and in the evidence allunde, from which an inference can be legitimately drawn as to the time when it was actually made": See, also, *Wilson v. Henderson*, 17 Miss. 375, 48 Am. Dec. 716; *Heffelfinger v. Schultz*, 16 Serg. &

R. 44. See, contra, *Wilson v. Hayes*, 40 Minn. 631, 12 Am. St. Rep. 754, 42 N. W. 467.

8. Certain authorities would limit this latter presumption, i. e., that the alteration was after execution, to cases where the circumstances are suspicious. This rule, though not so harsh as the other, is much more difficult of application, and is quite properly criticised in *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467, as follows: "This furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration, and when it is not. Who is to determine, and by what test, whether the alteration is suspicious? And it seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence may tend to prove that the alteration was made after delivery, and, therefore, throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we would find no special fault with the rule. But, it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case." For cases which hold that an alteration which is suspicious will be presumed to be made after execution, or, at least, that "the holder must explain it," see *Alabama etc. Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South, 440; *Fontaine v. Gunter*, 31 Ala. 264; *Powell v. Banks*, 48 S. W. 664; *Kelley v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075; *Tillon v. Clinton etc. Ins. Co.*, 7 Barb. 564; *Collins v. Ball*, 82 Tex. 259, 27 Am. St. Rep. 877, 17 S. W. 614; *Park v. Gliver*, 23 Tex. 470; *Deweese v. Bluntzer*, 70 Tex. 406, 7 S. W. 820; *Harper v. Stroud*, 41 Tex. 372; *Bradley v. Dells Lumber Co.*, 105 Wis. 245, 81 N. W. 394; *Smith v. United States*, 69 U. S. 219. The doctrine of these cases is, perhaps, best expressed in the frequently quoted language of McCrary, J., in *Cox v. Palmer*, 1 McCrary, 431, 8 Fed. 16: "If the interlineation is in itself suspicious, as if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words, or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution, and the onus would rest with the party offering the instrument to explain it. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution." In the latter cases the onus would be cast upon the party alleging an unauthorized alteration to show that it was unauthorized in fact.

In *Stoner v. Ellis*, 6 Ind. 152, a variation of this doctrine is established. After an excellent review of the various rules urged by other cases the court says: "We are of the opinion that, where the alteration is of such a character as to defeat entirely the operation of the instrument for any purpose, as in the case of the erasure of the signature and seal to a deed or other instrument, so that admitting all that appears upon the instrument when produced, it would be void in law, it should be explained in the first instance, before it should be permitted to go to the jury. In other cases the instrument should be given in evidence, and should go to the jury, upon ordinary proof of execution, leaving the parties to such explanatory evidence as they may choose to give." It may be said of this, however, that where an instrument, when offered in evidence, has no apparent binding force, it would, of course, be excluded if no explanation were offered, but this exclusion would be because the instrument was an apparent nullity, and not because of any alteration apparent on its face. The case suggested by the court would not, it would seem, leave any room for a presumption arising from an apparent alteration, and the distinction attempted is, therefore, of little value.

4. And, finally, there is a line of cases representative of the view that, in the absence of explanation, an alteration apparent upon the face of the instrument, whether suspicious or not, will be presumed to have been before or at the time of the execution of the instrument; *Sharpe v. Orme*, 61 Ala. 263; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82, 13 South. 570; *Portsmouth Sav. Bank v. Wilson*, 5 App. Dec. (D. C.) 8; *Orlando v. Gooding*, 34 Fla. 244, 15 South. 770; *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871; *Stewart v. Preston*, 1 Fla. 10, 44 Am. Dec. 621; *Hagan v. Merchants' Ins. Co.*, 81 Iowa, 821, 25 Am. St. Rep. 493, 46 N. W. 1114; *First Nat. Bank v. Franklin*, 20 Kan. 264; *Letcher v. Bates*, 6 J. J. Marsh. 524, 22 Am. Dec. 92; *Wickes v. Caulk*, 5 Har. & J. 36; *Brand v. Johnrowe*, 60 Mich. 210, 26 N. W. 883; *Shrine v. Briggs*, 81 Mich. 443; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467; *Whitmer v. Frye*, 10 Mo. 848; *Hunt v. Gray*, 85 N. J. L. 227, 10 Am. Rep. 232; *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424, 53 Am. Dec. 258; *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep. 705, 43 N. E. 683; *Franklin v. Baker*, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550; *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. 270; *Wikoff's Appeal*, 16 Pa. St. 261, 53 Am. Dec. 597; *Foley-Wadsworth etc. Co. v. Solomon*, 9 S. Dak. 511, 70 N. W. 639; *Kleeb v. Barb*, 12 Wash. 140, 40 Pac. 733; *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140; *Cox v. Palmer*, 1 McCrary, 431, 8 Fed. 16. In these cases, as in nearly all those which attempt to deal with the presumptions arising from apparent alteration, there is much loose language, and many cases might well be cited in support of two utterly inconsistent doctrines. Thus, while some, such as *First Nat. Bank v. Franklin*, 20 Kan. 264, would seem to distinguish between apparent alterations which

are and those which are not suspicious, and impliedly to hold the rule applicable to the latter only, others, such as *Serrine v. Briggs*, 31 Mich. 443, hold the rule applicable even where the alteration is suspicious; and others, as *Whitmer v. Frye*, 10 Mo. 348, make no mention of the character of the alteration—whether suspicious or not.

In Georgia, it seems to be the accepted doctrine that an apparent alteration is presumed to be made before execution, except when the execution of the instrument is expressly denied under oath: *Banks v. Lee*, 73 Ga. 25; *Thompson v. Gowen*, 79 Ga. 70, 3 S. E. 910; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

2. **Presumption as to Party Making Alteration.**—It is the generally accepted rule that when an alteration subsequent to execution is once shown to have been made, especially where it has been in the custody of the holder since execution, it will be presumed to have been made by him, or by one under whom he claims, and not by a stranger to the instrument: *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Winter v. Pool*, 100 Ala. 503, 14 South. 411; *Lamar v. Brown*, 56 Ala. 157; *Andrews v. Calloway*, 50 Ark. 358, 7 S. W. 449; *Lewis v. Shepherd*, 1 Mackey (D. C.), 46; *Daniel v. Daniel*, Dud. (Ga.), 239; *Scott v. Walker*, Dud. (Ga.), 243; *Castro v. Evinger*, 17 Ind. App. 298, 46 N. E. 648; *Green v. Beckner*, 3 Ind. App. 39, 29 N. E. 172; *Bowman v. Mitchell*, 79 Ind. 84; *Cochran v. Nebeker*, 46 Ind. 460; *Maguire v. Eichmeyer*, 109 Iowa, 301, 80 N. W. 395; *Croft v. White*, 36 Miss. 455; *Bowers v. Jewell*, 2 N. H. 543; *Chesley v. Frost*, 1 N. H. 145; *Trow v. Glen Cove Starch Co.*, 1 Daly, 280; *National Ulster Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299; *Hubbard v. Williamson*, 25 N. C. 397; *Bowser v. Cole*, 74 Tex. 222, 11 S. W. 1131; *Davis v. Crawford* (Tex.), 53 S. W. 384; contra, *Willard v. Ostrander*, 51 Kan. 481, 37 Am. St. Rep. 294, 32 Pac. 1092; *Phillips v. Breck*, 79 Ky. 465.

BISHOP v. MINDERHOUT.

[128 Ala. 162. 29 South. 11.]

CONDITIONAL SALE—DESTRUCTION OF PROPERTY.—

When personal property is sold and delivered under an agreement that the title is to remain in the vendor until payment, and it is destroyed without fault of the vendee, the loss falls on the vendor. (p. 135.)

Bricken & Bricken and Rushton & Powell, for the appellant.

J. O. Sentell and C. E. Hamilton, for the appellee.

¹⁶³ HARALSON, J. The case presented is, that the plaintiffs below, Minderhout & Nichols, who are appellees, sold, on the 7th of November, 1896, to the defendant, Bishop, the appellant, a piano, for which he paid ¹⁶⁴ in cash one-fourth of the purchase price, and gave plaintiffs his notes for the balance, in equal annual installments, falling due, respectively, on the 7th of November, 1897, 1898, 1899. The one due November 7, 1897, was paid, and the one sued on matured on the 7th of November, 1898. These notes each stipulated that the piano should remain the property of Minderhout & Nichols, the plaintiffs, subject to their direction, until said notes were paid in full. The piano was delivered at the time of the sale into the possession of defendant. Before the note sued on fell due—on the 19th of August, 1898—the defendant's house, and the piano with it, were totally destroyed by fire, without the fault or negligence of defendant. There was no conflict in the evidence. Each party requested the general charge. The court gave the one asked by plaintiffs and refused the one requested by defendant.

The case was greatly overburdened by unnecessary pleadings. The issue was, On whom did the loss resulting from the destruction of the property fall—on the plaintiffs or defendant? and this was the only one tried. It is unnecessary, therefore, to notice the various rulings on the pleadings.

The question presented is one of conflict in the authorities. In the sixth American and English Encyclopedia of Law, second edition, 455, it is stated that "when personal property is sold and delivered to the vendee under an agreement that the title is to remain in the vendor until payment, the loss or destruction of the property while in the possession of the vendee before payment, without his fault, does not relieve him from the obligation to pay the price." Cases from Mississippi, Missouri, North Carolina, and Georgia are cited to sustain the text. But in this and some other states this rule does not prevail. "The common law fixes the risk where the title resides": 1 Benjamin on Sales, sec. 319; Jones v. Brewer, 79 Ala. 547; Grant v. United States, 7 Wall. 331. In Stone v. Waite, 88 Ala. 599, 7 South. 117, this court said as to this principle: "Generally, the law fixes the loss on the party in whom the title resides [referring to the 79th Ala. and 7 Wall. cases, supra, as authority]. When personal chattels ¹⁶⁵ are sold, on condition that the seller retains the title until paid for, and possession is delivered, the buyer may sell his interest, subject to

the rights of the vendor. The title does not vest in the buyer, until performance of the condition, and until it does pass, the risk of loss remains in the seller: 1 Benjamin on Sales, secs. 452, 427." See, also, 1 Benjamin on Sales, secs. 364, 425-436, and authorities cited.

It is unnecessary to repeat what has heretofore been so fully stated in the decisions of this court, to sustain the correctness of the doctrine stated. A reference to others not already cited will be sufficient: *Sumner v. Woods*, 67 Ala. 139, 42 Am. Rep. 104, and note; *Fairbanks v. Eureka Co.*, 67 Ala. 109; *Foley v. Felrath*, 98 Ala. 176, 39 Am. St. Rep. 39, 13 South. 485; *Warren v. Liddell*, 110 Ala. 232, 20 South. 89.

The general charge should have been given for the defendant and not for the plaintiff, as was done.

Reversed and remanded.

The Doctrine of the Principal Case is opposed to *Tufts v. Griffin*, 107 N. C. 47, 22 Am. St. Rep. 863, 12 S. E. 68; *Burnley v. Tufts*, 66 Miss. 48, 14 Am. St. Rep. 540, 5 South. 627; but is supported by some of the cases cited in the note to *Tufts v. Griffin*, 22 Am. St. Rep. 863.

PRESTWOOD v. MCGOWIN.

[128 Ala. 267, 29 South. 886.]

COVENANTS OF SEISIN AND WARRANTY—BREACH OF.—An eviction or ouster, either actual or constructive, is essential to a breach of covenants of seisin and warranty of title. (p. 137.)

COVENANTS OF SEISIN.—IN DECLARING ON A BREACH of a covenant of seisin, all that is necessary is to negative the words of the covenant generally. It is unnecessary to aver an eviction or ouster. (pp. 137, 139.)

COVENANTS OF WARRANTY.—IN DECLARING ON A covenant of warranty of title, it is not sufficient to negative the words of the covenant generally, but the complaint should contain separate counts and assignments for each of the breaches for which a recovery is sought. (p. 137.)

COVENANTS OF SEISIN AND WARRANTY—BREACH OF.—COVENANTS to the effect that the grantees, at the time covenants of seisin and warranty of title were entered into, found the premises in the adverse possession of parties claiming under a paramount title, and that they were held out of possession under such title existing at that time, are good averments of a breach of both such covenants. (p. 139.)

COVENANTS OF SEISIN AND WARRANTY.—THE MEASURE OF DAMAGES for the breach of covenants of seisin and war-

ranty of title occurring at the time of the conveyance, is not the value of the land at such time, but the purchase money paid with interest and costs of suit. (p. 141.)

A COVENANT OF SEISIN DOES NOT RUN with the land, and is broken, if at all, as soon as it is made, and not by any future event. The breach can be taken advantage of only by the covenantor or his personal representative, and can neither pass to an heir, a devisee, nor a subsequent purchaser. (pp. 139, 140.)

COVENANTS OF WARRANTY OF TITLE ARE PROSPECTIVE in their character, run with the land, and are not broken until eviction. But a right of action for damages for such covenants does not pass with the land, if the grantee is dead at the time the covenants are broken, in which event his executor or administrator is alone entitled to sue. (p. 140.)

COVENANTS OF SEISIN AND WARRANTY—WHO MAY ENFORCE.—If covenants of warranty of title and of seisin are broken at the time of the conveyance, the grantees alone, and the personal representatives of such as have since died, and not their heirs, are entitled to sue for damages for the breach. (p. 140.)

COVENANTS OF SEISIN AND WARRANTY—PARTIES IN ACTION FOR BREACH.—Where covenants of seisin and warranty of title are broken at the time of the conveyance, and two of the grantees, and the heirs of the others, bring an action for the breach, the heirs having no right to maintain the action, all must fail, though the evidence may sustain the action as to some. (pp. 140, 141.)

Powell & Albritton, for the appellants.

Stallworth & Burnett, for the respondents.

273 HARALSON, J. This action seeks damages for the breach of covenants of seisin and warranty of title to land. An eviction or ouster, either actual or constructive, is essential to the breach. The eviction need not be with force. If it appears that the covenantor has yielded to a paramount title, whether it was derived from his own grantor or from a stranger, and he gives up the possession, if he ever had it, or he becomes the tenant of him of superior title, or has purchased his title, that is sufficient as being a constructive ouster. So, again, if the covenantor has been denied or held out of possession, by one in actual possession under paramount title at the time of the conveyance, this would be a breach of the covenant: Griffin v. Reynolds, 17 Ala. 198; Gunter v. Williams, 40 Ala. 561; Copeland v. McAdory, 100 Ala. 553, 559, 13 South. 545; Moore v. Vail, 17 Ill. 185; Witty v. Hightower, 12 Smedes & M. 478; 2 Greenleaf on Evidence, 244; Tiedeman on Real Property, secs. 855, 860; Rawle on Covenants for Title, sec. 139.

"The covenant for quiet enjoyment and of warranty [of title] are practically identical in operation; and whatever constitutes the breach of the one covenant is a breach of the other. Either extends to all lawful, outstanding adverse claims upon the premises conveyed": *Copeland v. McAdory*, 100 Ala. 559, 13 South. 545; *Tiedeman on Real Property*, sec. 855.

In declaring a breach on a covenant of seisin, or of good right to convey, all that is necessary is to negative the words of the covenant generally; but, as we have seen, this is not sufficient in declaring on the covenants for quiet enjoyment and of warranty of title: *Copeland v. McAdory*, 100 Ala. 559, 13 South. 545. From the case cited it will be seen that the complaint, to be in proper form, should contain separate counts and assignments for each of the breaches for which a recovery is sought. The complaint here joins the covenants of seisin and ²⁷³ warranty of title in one count as a basis for recovery. The demurrer as to the sufficiency of the complaint in averring a breach of the covenant of seisin and warranty is: "2. Said complaint avers that the covenants of warranty and seisin as to the lands therein described were broken at the time of making the same, but fails to aver that the plaintiffs were ousted from the lands described in the complaint by an outstanding title, which was in existence at the time of making said covenant of warranty and seisin, and fails to aver that said title was paramount to the title obtained from these defendants; and 3. Said complaint avers that the covenant of warranty to the lands therein described was broken, but fails to aver that plaintiffs were ousted from the lands described in said complaint by an outstanding title which was paramount to the title which was obtained by these defendants."

The averments of the complaint are, that the defendants, the grantors in the conveyance, covenanted with the grantees therein that they were lawfully seised in fee simple of said premises, that they were free from all encumbrances, and that they had a good right to sell and convey the same, and—to employ the language of the deed—"that we will, and our heirs, executors, and administrators shall, warrant and defend the same [the grantees, naming them], their heirs and assigns forever, against the lawful claims of all persons." The breach of covenant assigned is: "And the plaintiffs aver that said covenants of warranty and seisin have been broken in this, that at the time of making said covenant of warranty, said de-

defendants had no title to [describing a part of the lands conveyed] and were not lawfully seised of said lands, but that one J. F. Anderson had the title to said land, and was in the adverse possession of the same"; and the same averments were made in respect to four other parcels of said lands, alleged to be in the separate adverse possession of four other parties named. The complaint as to this concludes: "And plaintiffs aver that all of said lands have been lost to them ²⁷⁴ on account of the superior and paramount title and possession of the above-named persons, which said lands were of the value of fifteen hundred dollars. And plaintiffs further aver that they have brought actions of ejectment in the circuit court of Covington county, Alabama, against each of the above-named parties to recover the lands held by them, and failed by reason of their adverse possession and superior title to that conveyed by the defendants to these plaintiffs." We apprehend that, under the principles above announced, these averments are full to the effect that the grantees, at the time the covenant was entered into, found the premises in the adverse possession of parties claiming under a paramount title, and that they were prevented and held out of possession under such paramount title, existing at that time, which are good averments of breach of covenant both of seisin and warranty of title. As for the grounds assigned, there was no error in overruling the demurrer.

As has appeared, the complaint counts on breaches both of the covenants of seisin and warranty of title, claiming damages for the breach of each. The covenant of seisin, we have shown, does not run with the land, and is broken, if at all, as soon as it is made, and not by the occurrence of any future event, and it is unnecessary to aver an eviction or ouster—all that is necessary being to negative the words of the covenant generally: *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545. Mr. Rawle, in speaking of the covenants of seisin, for right to convey, and against encumbrances, says: "The covenant is, that a particular state of things exists at that time [the time of its creation], and if this be not true, the delivery of the deed which contains such a covenant causes an instant breach; these covenants are, then, it is held, turned into a mere right of action, which is not assignable at law, which can be taken advantage of only by the covenantee or his personal representatives, and can neither pass to an heir, a devisee, nor a

subsequent purchaser": Rawle on Covenants for Title, secs. 205, 214; Tiedeman on Real Property, sec. 860.

²⁷⁵ It is to be inquired what effect the breach of warranty of title, in the lifetime of the grantee, or one occurring after his death, has upon the right of action to recover damages for its breach, and the party entitled to prosecute the action therefor. Discussing this question, Mr. Tiedeman says: "Like covenants of quiet enjoyment, until a breach has been committed, a covenant of warranty runs with the land into the hands of the assignee and heirs, and may be sued upon by the assignee or heir who is in possession when the breach occurs, whether the alienation is voluntary or involuntary. After a breach there can be no assignment at common law, and it is still universally true that the covenant then ceases to run with the land. But in order that a covenant may run with the land to assignees, the grantee must, by the conveyance, acquire the actual or constructive seisin. If at the time of the conveyance the grantor had neither title nor seisin, nothing passed by the deed, and the covenant remains with the grantee and cannot be enforced by an assignee. For actual adverse possession under a paramount title at the time of conveyance is itself a breach of the covenant. . . . The assignee in possession at the time of the breach is generally the only person who can maintain an action upon the covenant": Tiedeman on Real Property, sec. 860.

Covenants for quiet enjoyment, of warranty of title and for further assurances are held to be prospective in their character, run with the land, and are not broken until eviction: Rawle on Covenants for Title, secs. 204, 205, 316. As to these covenants—of warranty of title and for further assurances—the same author observes in the section last referred to: "Although, from some expressions in the cases of *Kingdon v. Nottle*, 1 Maule & S. 355, and *King v. Jones*, 5 Taunt. 418, it would seem to have been thought that the modern covenants for title, like the ancient warranty, descended as to their benefit upon the heir, irrespective of the time at which the breach took place, yet such a doctrine has since been corrected [citing the cases], and it is now well settled that where the breach occurs in the lifetime of the ancestor or the testator, the right ²⁷⁶ to recover the consequent damages vests in his personal representative. . . . Where, however, the breach occurs after the death of the ancestor or testator, the right of action must be

exercised by the heir or devisee on whom the damage has fallen." As to the rights of the executor or administrator, the author further observes: "They are entitled to the benefit of the covenants for title, which could have been taken advantage of by the testator or intestate during his lifetime, and which were broken before his death": Sec. 317.

In 8 American and English Encyclopedia of Law, second edition, pages 155, 156, citing in support thereof decisions from many states, it is said: "A covenant of general warranty, being one of those which runs with the land, is intended for the benefit of the ultimate grantee in whose time it is broken, and he may maintain an action thereon in his own name. Covenants may run with the land, but damages arising from broken covenants do not; nor do they inure to subsequent grantees of the title. He in whose time the covenant is broken, whether the grantee or one who claims and holds under him, is the proper person to bring an action for the breach of covenant": 4 Am. & Eng. Ency. of Law, 1st ed., 511. So it seems, on the principles stated, supported by the weight of authority, that a right of action for damages, for a covenant of warranty of title, does not pass with the land, if the grantee be dead at the time the covenant is broken, in which event his executor or administrator is alone entitled to sue: Authorities supra; 5 Ency. of Pl. & Pr. 354, 355.

The complaint in this case shows, as we have seen, that the covenant of warranty of title, as well as that of seisin—damages for the breach of which this suit was instituted—were broken at the time of the execution of the conveyance to the grantees therein. They alone, and the personal representatives of such as have since died, and not their heirs, are entitled, therefore, to maintain the action. Two of the original grantees in the deed, and the heirs of others, who died, brought the action. The heirs having no right to ²⁷⁷ maintain the action, the principle applies that when several parties sue jointly as plaintiffs, all must be entitled to recover or none can; and if any one of them is incompetent to sue, all must fail, though the evidence may sustain the action as to one or more of them: McLeod v. McLeod, 73 Ala. 43; Lovelace v. Hutchinson, 106 Ala. 418, 17 South. 623. The defendant's objection to the introduction of the deed of defendants to the grantees therein named should have been sustained.

It may be stated for the sake of another trial, if it should occur, that if the allegations of the complaint are true, the conveyance from defendants to plaintiffs, or a part of them, was executed while the lands were in the adverse possession of other parties, and while being good as between the immediate parties to it, it was void as to the holders of such adverse possessions and the persons in privity with them, and will not support ejectment by the plaintiffs—grantees in defendants' deed—against such adverse holders: *Pearson v. King*, 99 Ala. 125, 10 South. 919; *Parks v. Barnett*, 104 Ala. 438, 16 South. 136; *Croft v. Thornton*, 125 Ala. 391, 28 South. 84. It would follow, therefore, that the costs of plaintiff's suits in ejectment against said adverse holders of the possession of said lands, if ever instituted, wherein it is averred judgments were rendered for defendants, cannot be recovered of these defendants. It may be added, it does not appear that these judgments and the executions issued upon them had reference to the lands in question.

For the same purpose, let it be further said that the question propounded to the witness White by the defendants on his cross-examination—namely, "What was the difference in value, at the date of defendants' deed to you, of the Thomason lands you have testified about, and your own lands adjoining it?"—was improper, and the objection to it should have been sustained. It is not the value of the land at the time of the conveyance which is the measure of damages in a case of this character, but it is the purchase money paid with interest and costs of suit: *Clark v. Zeigler*, 79 Ala. 346; *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Kingsbury v. Milner*, 69 Ala. 502.

The judgment is reversed and the cause remanded.

Covenants of Seisin are generally held to be personal and not to run with the land. They are broken, if at all, immediately on the execution of the deed: See the monographic note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 685, 686.

Covenants of Warranty generally run with the land and descend to the grantee's heirs or pass to his assigns. They do not so run, however, if the covenantor has no title or is not seised when he makes the conveyance: See the monographic note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 686-690.

Covenants of Warranty.—To Constitute a Breach of a covenant for quiet enjoyment, there must be an eviction or ouster, actual or constructive, by title paramount. If the premises, at the time of the execution of the deed, are in the possession of a third person hold-

ing under paramount title, and the grantee is kept out of possession, this is a sufficient breach to sustain an action: See the monographic note to *Chestnut v. Tyson*, 53 Am. St. Rep. 119.

Covenants of Warranty.—The Measure of Damages for the breach of a covenant for quiet enjoyment is the consideration paid for the land, with interest, and the costs incurred in the suit by which the covenantee is evicted: See the monographic note to *Chestnut v. Tyson*, 53 Am. St. Rep. 120.

MOBILE TRANSPORTATION COMPANY v. MOBILE.

[128 Ala. 335, 30 South. 645.]

PUBLIC LANDS—SHORES AND BEDS OF STREAMS.—Under the compact by which Alabama was admitted to the Union, the title to all lands not reserved to the United States became the property of the state, and there was no reservation in the shores and beds of navigable streams. (p. 144.)

CONSTITUTIONAL LAW.—THE GENERALITY OF THE TITLE TO A STATUTE is no objection, if it may comprehend the particulars of the body of the act, and the act must be upheld if the subject may be comprehended in the title. (p. 145.)

CONSTITUTIONAL LAW—TITLE OF STATUTE.—A statute entitled "An act granting to the city of Mobile the riparian rights in the river front," while the body of the statute grants the fee, does not offend the constitutional requirement that each law shall embrace but one subject which shall be described in its title. (pp. 145, 146.)

NAVIGABLE WATERS.—A PATENT FROM THE UNITED STATES to lands adjoining a stream where the tide ebbs and flows extends only to the high tide line, and does not affect the previous title of the state to the land below high-water mark. (pp. 146, 149.)

NAVIGABLE STREAMS.—THE TITLE OF THE UNITED STATES to the shore of a stream where the tide ebbs and flows, to the line of high tide, becomes vested in a state on its admission to the Union and cannot be affected by any subsequent grant of the United States. (p. 147.)

NAVIGABLE WATERS.—THE SHORES OF TIDE WATER are held in fee by the states subject only to the reservation that the streams shall be public highways with the right of Congress to regulate commerce thereon. Such fee may be conveyed by a state, subject to the right of the United States respecting navigation, particularly where the conveyance is in furtherance of public interests. (p. 147.)

THE IDENTITY OF A MUNICIPAL CORPORATION IS NOT CHANGED by the repeal of its charter and the substitution of a new organization. If there is an alteration of name, it may be proper, in a pending suit, for the pleadings to trace the change; but if there is no such alteration, and judicial notice is taken of the laws effecting the change, it is unnecessary to make any averment

or obtain any order respecting the prosecution of the suit. (pp. 147, 148.)

EJECTMENT.—A CITY MAY RECOVER TRUST property in ejectment, and this when the land or a portion of it is servient to the flow of water or of navigation thereon. (p. 148.)

MUNICIPAL CORPORATION.—THERE CAN BE NO LIMITATION against a municipal corporation as to property held for the public. (p. 149.)

MUNICIPAL PROPERTY—ESTOPPEL TO ASSERT TITLE.—The wrong or error of collecting a tax on public property does not estop a municipal corporation to assert its legal title. (p. 149.)

IN EJECTMENT TO RECOVER A TIDE WATER SHORE up to high-water mark, an instruction limiting the recovery to the present high-tide line, which may be different from what it was when the grant was made or the action commenced, is properly refused. (p. 149.)

EVIDENCE IN EJECTMENT.—PUBLIC STATUTES and grants are admissible in evidence in ejectment when they constitute the title papers of a party. (p. 149.)

THE AUTHORITY OF AN ATTORNEY TO BRING A SUIT and represent the plaintiff is sufficiently shown by his oath. (p. 149.)

APPEAL.—THE DENIAL OF A MOTION TO RETAX COSTS, after the rendition of a judgment, will not be considered on appeal. (pp. 149, 150.)

Ejectment by the appellee, the city of Mobile, to recover certain lands on the shore of Mobile river up to high-water mark. After the action was begun the city's charter was repealed, but a new one was enacted substantially for the same locality and inhabitants. The authority of the plaintiff's attorney to conduct the action being called in question, was sustained by the attorney's oath. There was judgment for the plaintiff, from which the defendant appealed.

Frederick G. Bromberg, for the appellant.

Gregory L. & H. T. Smith, for the respondent.

346 TYSON, J. The present case is an action of ejectment in code form, by the city of Mobile, to recover of the appellant certain real estate described in the complaint, constituting the shore of part of Mobile river below high-water mark.

The plaintiff's title was derived from the state of Alabama through and by an act of the legislature, approved January 31, 1867, entitled "An act granting to the city of Mobile the riparian rights of the river front," supplemented by the acts of 18th February, 1895, and of December 5, 1896, the latter being amendatory of the former, and confirming and vesting

all rights theretofore vested in any municipal corporation of Mobile in the city of Mobile.

If the act of 1867 was operative, it is evident that the legal title to the shore of the river below high-water mark, as described in the act, under the rule of the common law, became vested in the city of Mobile. Though the property belonged to the United States before the admission of the state in the Union, by the compact under and by which Alabama became a state, the title to all lands not reserved to the United States became the property of the state of Alabama. It being well settled there was no reservation, and could be none, in the shores and beds of navigable streams, since such reservation would conflict with the fundamental law of organization under which new states are entitled to be on an equal footing with the original states, as well as with the constitution restricting the municipal jurisdiction of the United States to the particular cases enumerated therein: *Pollard v. Hagan*, 3 How. 212; *Escanaba etc. Co. v. Chicago*, 107 U. S. 689, 2 Sup. Ct. Rep. 185; *Huse v. Glover*, 119 U. S. 546, 7 Sup. Ct. Rep. 313; *Sands v. Manistee River Imp. Co.*, 123 U. S. 296, 8 Sup. Ct. Rep. 113; *Willamette Bridge Co. v. Hatch*, 125 U. S. 9, 8 Sup. Ct. Rep. 811; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548.

347 The chief important question is, whether the act of 1867 is a valid law. The appellant insists that it is void because its title does not sufficiently describe the purpose of the body of the act. The constitution of 1865, under which this law was enacted, required that "each law should embrace but one subject, which shall be described in the title": Const. 1865, art. 5, sec. 2. The title is, "An act granting to the city of Mobile the riparian rights in the river front"; while the body grants the fee. The objection is, that "riparian rights" could not comprehend the fee, but only easements therein, distinct from absolute ownership. The object of this provision of the constitution was to prevent surprise and fraud in passing laws under misleading titles. It should not, therefore, be construed so as to defeat, by too technical an application, legislation not clearly within the evil aimed at. If the title of an act is single, and directs the mind to the subject of the law in a way calculated to direct the attention truly to the matter which is proposed to be legislated upon, the object of the provision is satisfied. In such case, the generality of a title, not defining the particulars of the proposed legislation, would be more

apt to excite general attention than otherwise, since the general words would give warning that everything within their limits might be affected, and thus draw the attention of the whole body of legislators, while narrower words would only interest those concerned with the matters specially named. It is, therefore, held that the generality of the title is no objection if it may comprehend the particulars of the body of the act, and that the act must be upheld if the subject may be comprehended in the title: *Adler v. State*, 55 Ala. 21; *Ballentyne v. Wickersham*, 75 Ala. 536; *Quartlebaum v. State*, 79 Ala. 1; *Edwards v. Williamson*, 70 Ala. 145; 23 Am. & Eng. Ency. of Law, 1st ed., 229-235.

In this case, the body of the act grants the fee in the locus in quo; the title, "riparian rights." The question is, May not the "rights" comprehend absolute rights or property, to wit, a fee, and may not "riparian" be taken as a mere localizing term to "rights"? The first definition ³⁴⁸ of the word "riparian" in the Century Dictionary is, "pertaining to or situated on the bank of a river." We think the fair and reasonable meaning of the title is to grant rights (property) which are riparian—that is, situated on or along the bank (ripa) of the river. No great precision and nicety of language is necessary in such case. It is sufficient if the common and ordinary mind would understand from the title the subject in reference to which a particular law is proposed. We therefore hold the act in question free from the objection interposed to it.

The next question is, whether the patent from the United States in 1836 to the persons under whom defendant claimed, to the land adjoining the shore sued for, extended to low-water mark, and if so, affected the previous title to the state to the land below high-water mark. We must decide both of these questions in the negative. It is true the first point was decided otherwise in the case of *Webb v. Demopolis*, 95 Ala. 126, 13 South. 289, and in one or two other cases, relating to the shore line of streams above the ebb and flow of tide water. But these cases in no wise conflict with the common-law rule so often approved by this court and other jurisdictions that on streams where the tide ebbs and flows grants of adjoining lands only extend to the ordinary high-tide line along the shore. The law is definitely settled as to this point, and it could hardly have been the purpose of the decision in *Webb v. Demopolis*, 95 Ala. 126, 13 South. 289, to disturb this rule of property supported by a vast array of authorities without

making reference to them. At common law, the adjoining owner of the shore, would, in the case of Webb, have acquired title to the center of the stream, but the decision restricted the rule on account of the actual navigability of the stream to the line of low water. This cannot be a reason for enlarging the common-law rule as to tide-water shores which restricted the rights of adjoining owners to the line of high tide: *Mobile v. Eslava*, 9 Port. 577, 33 Am. Dec. 325, 16 Pet. 240; *Goodtitle v. Kibbe*, 1 Ala. 403, 9 How. 471; *Kennedy v. Bebee*, 8 Ala. 914; *Pollard v. Greit*, 8 Ala. 941; *Pollard v. Hagan*, 3 How. 212; *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643; *Hallett v. Beebe*, 13 How. 25; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, and the numerous authorities cited in brief of appellee's counsel.

But if the first point was decided otherwise, it cannot affect this case, because the title of the United States to the shore in question, to the line of ordinary high tide, became vested in the state on and by its admission as a state, and could not be affected by any subsequent grant of the United States, if there had been such: *Mobile v. Eslava*, 9 Port. 577, 33 Am. Dec. 325, 16 Pet. 240; *Pollard v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 1 Ala. 403, 9 How. 471; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548.

It is next insisted that the state could not grant the fee to the city of Mobile, and thereby divest itself of the trust under which the land was held. This court has decided that a deed by a trustee in violation of his trust nevertheless conveys the legal title and is valid in a court of law: *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160, 24 South. 984. But the grant in this case was not in fraud of the trust. On the contrary, it was made for the purpose of making it effective for the public good. The shores of tide water in all the states are held in fee by the states, subject only to the reservation and stipulation that such streams should forever be and remain public highways with the right in Congress to regulate commerce thereon: *Pollard v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 410; 4 Notes on United States Reports, 185 et seq., 412 et seq. And it cannot be doubted that the state may convey the fee in such shore, subject, of course, to the paramount rights of the United States respecting navigation, and particularly so when the conveyance is in furtherance of the public interests: *St. Anthony Falls Co. v. Commissioners*, 168 U. S. 360, 18 Sup. Ct. Rep. 157; *Packer v. Bird*, 137 U.

S. 671, 11 Sup. Ct. Rep. 210; Hagan v. Campbell, 8 Port. 25, 33 Am. Dec. 267; Williams v. Mayor, 105 N. Y. 433, 11 N. E. 829; Langdon v. Mayor, 93 N. Y. 129.

It is next insisted that the municipal corporation of Mobile was dissolved after the institution of this suit and that the suit cannot be further entertained. The modern doctrine is, that the identity of a municipal corporation is not changed by the repeal of its charter and the substitution of a new municipal organization for substantially the same inhabitants and locality. ³⁵⁰ When there is an alteration of a name, it may be convenient and proper for the pleadings to trace the change; but when the new organization bears the same name as the old, and the courts take judicial notice of the laws effecting the change, it is unnecessary to make any averment or obtain any order respecting the further prosecution of pending suits. Any authoritative appearance or step taken in the cause is the act of the new organization, which comes in, not by revivor, as in the case of representatives on the death of natural persons, but as the same party metamorphosed only in the external habiliments of organization and powers wrought by the new enactment: 1 Dillon on Municipal Corporations, sec. 172, and notes; Port of Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. Rep. 398; Broughton v. Pensacola, 93 U. S. 270; Milner v. Pensacola, 2 Woods, 632, Fed. Cas. No. 9619; 17 Fed. Cas. 407; Girard v. Philadelphia, 7 Wall. 1.

It is manifest from a reading of the act of February 11, 1879 (Acts 1878-79, p. 381), that only such property as was possessed by the city of Mobile that was subject to the payment of its debts passed by the terms of the act to the commissioners as trustees for the bondholders. This property was trust property, and, therefore, was not subject to the debts of the city and was not affected by the act.

It is further insisted that ejectment will not lie for the recovery of the premises. There is nothing in this contention. No matter what the trust may be, the trustee or holder of the legal title may recover the possession from one who ousts him or claims to hold adversely. He may do this even against a cestui que trust. Without this right, he might be unable to perform his duties. And it is of no consequence that the land or a portion of it is servient to the right of the flow of water over it or of navigation thereon: Newell on Ejectment, c. 2, secs. 20-22; Hoboken v. Pennsylvania R. R. Co., 124 U. S. 658, 8 Sup. Ct. Rep. 643; Barney v. Keokuk,

94 U. S. 324; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838; Mobile v. Eslava, 9 Port. 577, 33 Am. Dec. 325, 16 Pet. 240.

The defendant offered evidence of adverse possession of the lands in controversy since the grant to the city ³⁵¹ of Mobile in 1867, which was rejected. There was no error in this, since there can be no limitation against a municipal corporation as to property held for the public: Dillon on Municipal Corporations, sec. 675; Webb v. Demopolis, 95 Ala. 116, 13 South. 289; Olive v. State, 86 Ala. 94, 5 South. 653; Miller v. State, 38 Ala. 604. The presumption is that the property is public, and, indeed, the words of the grant make it such in this case. The wrong or error of collecting tax on public property on the same principle can create no estoppel against the assertion of the legal title, if it could have any effect on the right of such property: Hawkins v. Ross, 100 Ala. 463, 14 South. 278; McLeod v. Bishop, 110 Ala. 640, 20 South. 130; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13. The plaintiff showed by the evidence introduced a valid legal title to the land sued for, unaffected by limitation or an estoppel of any character.

The defendant offered no evidence of title or possession which could have any operation to defeat the plaintiff's right of recovery. The supposed Spanish grant to so operate was never complete, and besides there was no proof of such a grant. The grant in 1836 by the United States cannot be construed to cover the land below high-water mark along the shore, and, if it could, would be ineffective, because the title was divested out of the United States and vested in the state of Alabama on the admission of the state into the Union. The case of Goodtitle v. Kibbe, 1 Ala. 403, 9 How. 471, is decisive of this point against the appellant. The title vested in the United States on the acquirement of the territory from France, and passed irrevocably to the state on its admission and could not be affected by any subsequent act of the United States: Pollard v. Hagan, 3 How. 212. The possession by the defendant after the grant to the city in 1867 could not be adverse, so as to put in operation the statute of limitations, so as to entitle the defendant to compensation for improvements. And as the plaintiff's declaration was good, and its paper title perfect, and no evidence was admitted or rejected which could legitimately affect the plaintiff's rights to recover the ³⁵² shore land sued for below the high tide, there could be no error prejudicial to the appellant.

The defendant, however, insists that its third charge limiting the plaintiff's rights to recover the lands "covered by the description in the complaint" which is not now below high-water mark should have been given. The argument is, that the description in the complaint takes the western line far inland—that is, west of the high-water line. We do not find this is a fact. The description distinctly limits the western line, southwardly "along the high-water mark," which would necessarily limit the line to the high tide. Besides, the charge limits the recovery to the present high-tide line, which might be different from what it was when the grant was made or the suit commenced. There was no error, therefore, in the refusal of this charge.

Nor was there any error in the court's allowing public statutes and grants to be read in evidence when they constituted the title papers of the party. They constitute facts in the case, and are evidence in the strictest sense, which must go to the jury. It is the proper practice to read them to the jury, as was done in *Mobile v. Eslava*, 9 Port. 577, 33 Am. Dec. 325. It is always allowable to prove any fact which the court knows judicially. And certainly no injury can possibly result where it is permitted to be done.

The authority of the attorney to bring the suit and represent the plaintiff was sufficiently shown: *Williams v. Johnson*, 112 N. C. 424, 34 Am. St. Rep. 513, 17 S. E. 496, 21 L. R. A. 848, and note; *Tullock v. Cunningham*, 1 Cow. 256; *Pixley v. Butts*, 2 Cow. 421; *Denton v. Noyes*, 6 Johns. 298, 5 Am. Dec. 237.

After the rendition of the judgment the defendant made a motion to retax the costs in respect to fees of certain witnesses subpoenaed by the plaintiff. This motion was denied, and its refusal is here insisted upon as error. It may be conceded for the purposes of this appeal that the court committed an error in refusing to retax the costs, and yet this will not work a reversal of the judgment. The error, if committed, in no wise involves any ruling of the court upon the trial, but was subsequent to the rendition of the judgment, and cannot be said to have induced its rendition or to have ~~352~~ otherwise infected it. We must, therefore, decline to consider it further: *Mobile etc. R. R. Co. v. Owen*, 121 Ala. 505, 25 South. 612.

We have not deemed it necessary to notice in detail the many assignments of error, since the principles announced

by us involve the adjudication of all of them against the appellant. There is no error in the record, and the judgment is affirmed.

The Generality of the Title to a Statute is no objection so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection: See the monographic note to *Crookston v. County Commrs.*, 79 Am. St. Rep. 477, on the sufficiency of titles to statutes within the requirement of the constitution. Consult, also, on this subject, the monographic note to *Bobel v. People*, 64 Am. St. Rep. 79-107.

Submerged Lands.—The Titles to the beds of all lakes, ponds, and navigable rivers, up to the line of high-water mark, within the boundaries of a state, became vested in it at the instant of its admission into the Union, in trust for the benefit of its people: *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 85 N. W. 402.

Submerged Lands.—A Patent from the United States of land under lakes, ponds, and navigable rivers, whether made before a state within which it is located, is admitted into the Union or thereafter, conveys no title. A government patent of land bordering on a lake or pond does not convey title to land below the ordinary high-water mark: *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 85 N. W. 402. See, too, *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139; *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571, 61 N. W. 250

Submerged Lands.—Except as to a Qualified Title to submerged lands of navigable rivers conceded to shore owners, but which is not permitted to displace or materially affect public rights, the title to lands under lakes and navigable rivers is in the state, and it is powerless to change it. The state cannot transfer such title by grant or otherwise: *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 85 N. W. 402. Submerged lands of navigable lakes belong to the state in trust for the people for public use: *Pewaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859, 79 N. W. 436; *Prieve v. Wisconsin State Land etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780.

The Statute of Limitations does not run against a municipality as to property held in its public capacity: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-495.

A City Will be Estopped to Claim Lands where it has taxed them for thirty years: *Davenport v. Boyd*, 109 Iowa, 248, 77 Am. St. Rep. 536, 80 N. W. 314. Compare the note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 494, 495.

CAPITAL CITY INSURANCE COMPANY v. JONES.

[128 Ala. 361, 30 South. 674.]

LOAN ASSOCIATION—PAYMENT OF MORTGAGE.—Though it is stipulated in a mortgage to a building and loan association that the monthly payments are not to go in reduction of the debt secured, yet if they are so applied by the mortgagee, instead of in payment of stock subscribed for in the association, and the mortgagor assents thereto, the application will be upheld. (pp. 153, 154.)

FIRE INSURANCE—RECOVERY BY MORTGAGEE.—If insurance is effected on mortgaged premises payable to the mortgagee as his interests may appear, the balance, if any, to the mortgagor, and the amount due on the mortgage is equal to, or exceeds, the loss under the policy, the mortgagee is the only person entitled to recover. (pp. 153, 154.)

FIRE INSURANCE—RECOVERY BY MORTGAGOR.—If insurance is effected on mortgaged property payable to the mortgagee as his interests may appear, the balance, if any, to the mortgagor, and the amount due on the mortgage is less than the loss under the policy, the mortgagor may sue for the difference. (p. 154.)

Action on a fire insurance policy. The insured premises were mortgaged, and the evidence was conflicting as to whether the mortgage debt was greater or less than the amount due under the policy. There was a judgment for the plaintiff, from which the defendant appealed.

Thomas G. & Charles P. Jones and Edwin F. Jones, for the appellant.

J. F. Jones, B. M. Powell, and J. M. Chilton, for the respondent.

³⁶² **McCLELLAN, C. J.** When this cause was here on a former appeal the questions now presented for review by this record were not presented or decided: *Jones v. Capital City Ins. Co.*, 122 Ala. 421, 25 South. 790.

On the third day of January, 1894, one Liverman made an assignment of all his property to one J. P. Etheridge for the benefit of certain of his creditors, not including, among them, the National Building and Loan Association. In the list of property conveyed was a storehouse and lot owned and occupied by him, upon which was a mortgage to the National Building and Loan Association for one thousand dollars. As to this house and lot it is expressly provided in the deed of assign-

ment that only the equity of redemption is conveyed. By the terms of the mortgage given by Liverman to the National Building and Loan Association, which mortgage was recognized as valid, substituting and binding upon him to keep this storehouse insured in some reliable insurance company for at least fifteen hundred dollars, payable in case of loss to the association to the amount ⁸⁰³ secured by the mortgage. On the 5th of May following, J. P. Etheridge, assignee, procured the issuance of the policy of insurance sued upon. This policy was for one thousand dollars upon the storehouse in which he acquired by the deed of assignment the equity of redemption—the right to pay off and discharge the mortgage to the National Building and Loan Association. It would seem that for the purpose of carrying out the mortgage contract imposing the obligation to insure the house for the benefit of the mortgagee, there was inserted in the body of the policy this clause: "Any loss occurring under this policy will be due and payable to the National Building and Loan Association of Montgomery, Alabama, mortgagees, as their interest may appear, balance, if any, to J. P. Etheridge assignee of W. E. Liverman, for the use of the creditors of the said W. E. Liverman, named in his deed of assignment now recorded in the office of the judge of probate of Conecuh county, Alabama."

On the 6th of November, 1894, the house was destroyed by fire. Its value is shown to have been about two thousand dollars, making the amount due upon the policy one thousand dollars, its face value.

In November, 1895, Etheridge transferred the policy to the plaintiff who became his successor by appointment of the chancery court to administer the trust estate, and who instituted and prosecuted this suit, which resulted, upon the trial, in a judgment in his favor for the full amount of the policy.

There was, at the time the loss became due and payable under the policy, due upon the mortgage, if we accept the plaintiff's construction of the evidence, the sum of eight hundred and eighty-eight dollars and some cents. The contention of the defendant, however, is that the evidence undisputedly, and beyond adverse inference, shows that there was due upon the mortgage the sum of one thousand dollars—an amount equal to the amount of the policy. This contention is based upon the stipulation in the mortgage providing for the application of the monthly payments made under it. Un-

der these stipulations, these monthly payments did not go in reduction of the principal of the debt secured by the mortgage: *Southern Building etc. Assn. v. Anniston Loan etc. Co.*, 101 Ala. 582, 46 Am. St. Rep. 138, 15 South. 123; *Gwin v. National Building etc. Assn.*, 126 Ala. 679, 28 South. 1011.

It doubtless could be affirmed, as a matter of law, that the monthly payments should be applied as agreed upon in the mortgage contract, in the absence of all evidence that they had not been applied to the principal sum and interest thereon secured by the mortgage. But there is no rule of law or of public policy which prohibits their application on the mortgage debt, instead of upon the stock subscribed for in the association by the mortgagor. If they were so applied by the mortgagee and the mortgagor assented to their application, they go to reduce the amount due upon the mortgage debt. Whether they were so applied is a question for the jury under the evidence in this case.

If the amount due upon the mortgage was equal to or exceeded the loss under the policy of insurance, the National Building and Loan Association or its assignee, being the exclusive beneficial owner of the whole money due by defendant, is the only person entitled to recover it. After the loss became fixed, "the policy was nothing other than a contract for the payment of money": Code, sec. 280; *Perry v. Merchants' Ins. Co.*, 25 Ala. 355; *Fire Ins. Cos. v. Felrath*, 77 Ala. 194, 54 Am. Rep. 58; *Baltis v. Dobin*, 67 Barb. 507; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6; *Donaldson v. Insurance Co.*, 95 Tenn. 280, 32 S. W. 251; *Bartlett v. Iowa State Ins. Co.*, 77 Iowa, 86, 41 N. W. 579; *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64, 39 Am. St. Rep. 386, 25 Atl. 989, 27 Atl. 314; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 50 Am. Dec. 591; *Franklin v. National Ins. Co.*, 43 Mo. 491; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Insurance Co. v. Chase*, 5 Wall. 509; *Flanders on Insurance*, 588.

Can the plaintiff maintain this action in the event the amount due upon the mortgage debt is less than the amount of the loss, which we have shown was the face of the policy? In the case of *Fire Ins. Cos. v. Felrath*, 77 Ala. 194, 54 Am. Rep. 58, the policies contained the provision "Loss, if any, payable to Joseph Felrath, to the extent of his mortgage interest." The amount due to Felrath at the time of the loss was less than the amount of the policies. The court, after recognizing the right ³⁶⁵ of Felrath to recover had the

amount of his mortgage been equal to or exceeded the amount of the policies, said: "They [the policies] appointed the payment of a part of the money to Felrath, in case of loss. They did not appoint the payment of the entire sum, nor were the policies assigned. They did not confer on Felrath a right to sue for a part, and on Clark [the insured] the right to sue for the residue. That would have been to split one contract into two causes of action, which can only be done by agreement of debtor and creditor, having that object in view." It is obvious from this language that Felrath was denied the right to maintain the suit, because the court was of the opinion that the debtor, the insurance companies, had not agreed to split the debt or cause of action, so as to entitle Felrath to maintain a suit for his portion of the loss and Clark for his part. Had Clark brought the suit, the same process of reasoning would have defeated any recovery by him. For he could have no more been allowed to split the cause of action than Felrath. The logical result of the holding in that case is, that Felrath and Clark should have brought a joint action. We are of the opinion that the decision is wrong on this point, and it is overruled. That the agreement on the part of the insurance companies, the debtor, to pay to Felrath so much of the loss as was equal to the amount of his mortgage debt and the balance to Clark was a separate, independent and distinct promise to each—a splitting of the debt or cause of action by the debtor upon which each could maintain separate suits for the amount due him. So in this case, we hold that the plaintiff can maintain this suit for the balance, if any, of the loss, after deducting the amount due upon the mortgage at the time of the loss. This is the promise of the defendant, and there is no good reason why it should not be enforced as made: *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189, 55 Am. St. Rep. 387, 44 N. E. 211. This, of course, imposes the burden upon the plaintiff of showing there was a balance, after paying the mortgage, and the amount of such balance.

³⁶⁶ The rulings of the circuit court were not in conformity to these views, and the judgment must be reversed and the cause remanded.

Tyson, J., not sitting.

Insurance on Mortgaged Premises.—An action by a mortgagee may be maintained on a policy of insurance issued to the mort-

gagor but payable to the mortgagee as his interest may appear where the amount of the debt secured by the mortgage exceeds the insurance and the whole value of the property: *Lowry v. Insurance Co.*, 75 Miss. 43, 65 Am. St. Rep. 587, 21 South. 664; *Peck v. Girard etc. Ins. Co.*, 16 Utah, 121, 67 Am. St. Rep. 600, 51 Pac. 255. See, in this connection, *Reynolds v. London etc. Ins. Co.*, 128 Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467; *Aetna Ins. Co. v. Thompson*, 68 N. H. 20, 73 Am. St. Rep. 552, 40 Atl. 396; monographic note to *King v. State etc. Ins. Co.*, 54 Am. Dec. 693-700. And it is held that the mortgagee is a necessary party, though his interest is less than the amount of the insurance: *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 54 Am. St. Rep. 196, 32 S. W. 383. The mortgagee may maintain the action without joining the mortgagor, whether the loss is greater or less than the sum due upon the mortgage. But the mortgagor may sue for the whole loss, if the mortgagee consents: *Palmer Sav. Bank v. Insurance Co.*, 166 Mass. 189, 55 Am. St. Rep. 387, 44 N. E. 211.

FIRST NATIONAL BANK OF TALLADEGA v. BROWNE.

[128 Ala. 557, 29 South. 552.]

FRAUDULENT TRANSFER.—IF A CONVEYANCE IS OF A HOMESTEAD alone, no fraud as to creditors can be predicated upon it. (p. 157.)

HOMESTEAD—MARSHALING AND SUBROGATION.—It is not the policy of the homestead law to apply the doctrine of marshaling assets or of subrogation, in order that the property may be subjected to encumbrances not created by the debtor himself. (pp. 157, 158.)

HOMESTEAD—MARSHALING AND SUBROGATION.—A judgment creditor, who has no lien on the homestead of his debtor, is not entitled to subrogation against a mortgagee of the homestead, nor to a marshaling of assets. (pp. 157, 158.)

Bill by Sarah B. Brown, the appellee, against the First National Bank of Talladega to quiet title to certain land and determine certain claims thereto. There was a decree establishing title in the complainant and ordering the defendant to be perpetually enjoined to set up any claim or title to the property. The defendant appealed from this decree, assigning its rendition as error.

Knox, Bowie & Dixon, for the appellant.

Browne & Dyer, for the respondent.

559 SHARPE, J. This suit is brought under the statute (Code, sec. 809 et seq.), to have determined, as between com-

plainant and defendant, their respective rights in a lot in Talladega.

The complainant claims as a purchaser from J. J. Hendricks, and the respondent asserts an interest in the lot as a creditor of Hendricks. The following facts appear of record and are undisputed: During the year 1898, and at the time of the occurrences which gave rise to the claims of both parties, the lot in controversy was Hendricks' homestead, and was of the value of eighteen hundred dollars and not more. It was subject to a mortgage held by J. M. Lewis for a balance due him from Hendricks as purchase money for the lot, amounting to seventeen hundred and forty dollars. Defendant held a note against Hendricks given in January, 1898, payable in March of that year. Shortly after the note became due, Hendricks made an assignment of property for the benefit of creditors, reserving therefrom the homestead lot. In June, 1898, defendant obtained and registered a judgment on the note against Hendricks, in which there was a recital of his ⁵⁶⁰ waiver of exemptions as to personal property only. Defendant and Lewis both participated as creditors in the distribution of funds by the assignee, Lewis receiving on his mortgage debt five hundred and thirty-three dollars and eighty cents. In December, 1898, complainant, with notice of the facts stated, bought the lot of Hendricks, and received his conveyance, for the price of fifteen hundred and fifty dollars, which was settled by her paying four hundred and fifty dollars in cash and assuming to pay the amount remaining unpaid on Lewis' mortgage, amounting to eleven hundred dollars.

By the common law, lands were not subject to the payment of debts. The creditor's remedy to so subject them exists by statute only; and by the constitution, supplemented by the statute, the remedy is withheld from that portion of the lands which, within the legally prescribed area and the value of two thousand dollars, constitute the debtor's homestead. The exemption extends to the debtor's entire interest in the land, and does not operate a mere postponement of any acquired or prospective lien or right of the creditor, but it prevents his acquisition of such rights. The sale by the debtor of his entire estate in the homestead, though that interest extend to the fee, is not prejudicial to the creditor, for the reason that the creditor has no interest in such property, and the sale withdraws nothing which had been within his reach. Upon this ground numerous decisions of this court have settled the doc-

trine that where the conveyance is of the homestead alone, no fraud as to creditors can be predicated upon it: *Kennedy v. Bank*, 107 Ala. 170, 18 South. 396; *Fuller v. Whitlock*, 99 Ala. 411, 13 South. 80; *Pollak v. McNeil*, 100 Ala. 203, 13 South. 937, and cases there cited.

The waiver of exemptions embodied in defendant's judgment did not extend to real estate, consequently no lien was acquired under that judgment; neither do the facts exist from which the defendant can acquire a lien by attacking the conveyance for fraud.

Defendant can have no interest in the property by subrogation to the rights of Lewis under his mortgage even to the extent he was paid from the general property assigned. The law exempting the homestead from debt is to be liberally construed. It is not its policy ⁵⁶¹ to apply the doctrine of marshaling assets, or the fiction of subrogation, in order that the property may be subjected to encumbrances not created by the debtor himself: *Ray v. Adams*, 45 Ala. 168; *Mitchelson v. Smith*, 28 Neb. 583, 26 Am. St. Rep. 357, 44 N. W. 871; *Armitage v. Toll*, 64 Mich. 412, 31 N. W. 408, 15 Am. & Eng. Ency. of Law, 691. If Lewis' debt had been unsecured, he would still have been entitled to share in the general assets, and since the mortgage covered nothing which the complainant could have taken if there had been no mortgage, the equitable consideration upon which the doctrine of marshaling assets is based does not exist.

Let the decree be affirmed.

A Transfer of a Homestead Cannot be Fraudulent as to creditors of the grantor: *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595, 84 N. W. 359; *Gray v. Patterson*, 65 Ark. 373, 67 Am. St. Rep. 937, 46 S. W. 730, 1119; *Cox v. Birmingham Drygoods Co.*, 125 Ala. 320, 82 Am. St. Rep. 238, and cross-reference note thereto, 28 South. 456.

Homesteads—Marshaling.—Additional liability will not be imposed upon homesteads by marshaling securities: *Mitchelson v. Smith*, 28 Neb. 583, 26 Am. St. Rep. 357, 44 N. W. 871; *Pearson v. Pearson*, 59 S. O. 367, 82 Am. St. Rep. 846, 37 S. E. 917.

HOOD v. HAMMOND.

[128 Ala. 569, 30 South. 540.]

VENDOR'S LIEN—EVIDENCE OF RETENTION.—The fact that purchase money notes recite their consideration to be the sale of lands, and that the deed describes such notes as a consideration for the lands conveyed, evidences an intention that a vendor's lien should be retained. (p. 161.)

VENDOR'S LIEN—WAIVER BY TAKING COLLATERAL. If a vendee reconveys lands, and transfers a purchase money note of the subvendee to the original vendor as collateral security for the payment of the original purchase money notes, the vendor does not, by accepting such security, waive his lien, where he had an agreement with his vendee as to how the lien might be waived, which the transfer of the note did not impair. (p. 161.)

VENDOR'S LIEN—LIMITATION OF ACTIONS.—A vendor's lien for the purchase money of lands is preserved, though the statute of limitations has barred the recovery of the purchase money as a debt. (p. 162.)

VENDOR'S LIEN—WHEN NOT BARRED.—The failure of a vendor to present his purchase money notes to the administrator of his vendee within the time required by the statute of nonclaim, or to file them in the probate court within nine months after the declaration of the insolvency of the estate, does not cut off his vendor's lien. (p. 162.)

SETOFF AND RECOUPMENT.—ON A BILL TO ENFORCE A VENDOR'S LIEN, the vendee cannot recoup or set off damages sustained by the vendor's failure to collect a note given as collateral security for the payment of purchase money notes, without showing that such damages have been sustained and the amount thereof. (p. 163.)

J. D. Hammond conveyed certain lands to one Stewart, as trustee for himself and four others, the consideration therefor being two thousand dollars in cash and four promissory notes for two thousand dollars each. These notes recited that they were given "for value in real estate this day sold and deeded to J. S. Stewart," etc. As a part of the same transaction, Hammond executed to Stewart an agreement that if Stewart, his successors, assigns, or associates should "sell any portion of said lands, then if he or they shall pay to said Hammond in cash one-third of the amount for said land, or such portion of the same [as] is sold, then I, the undersigned [J. D. Hammond], bind myself to release the vendor's lien on said land, or such portion as may be sold, provided, however, if all of said land shall be sold, it shall not be sold for less than ten thousand dollars, and if only a portion or portions be sold, it must not be sold for a less sum than its pro rata share of the

ten thousand dollars, as compared to the whole interest sold. This does not prohibit the said parties from selling at lower rates than the above rates, but the undersigned is not bound to release the vendor's lien when sold for less." Subsequently, the property was partitioned between Stewart and his four associates. And afterward Stewart conveyed to C. D. Henley, as trustee for himself and associates, the land partitioned to him in consideration of fifteen hundred dollars in cash and two promissory notes for fifteen hundred and three thousand dollars, respectively. The three thousand dollar note Stewart assigned by blank indorsement to Hammond, as collateral security for the original purchase money notes of Stewart to Hammond. Stewart died. His administrator, O. R. Hood, filed a bill against Henley and associates to enforce the vendor's lien of his intestate on the land conveyed to Henley, and it was sold under a decree of court to Hood. The present bill was filed by Hammond against Hood, as administrator, to set aside the above decree, and enforce his vendor's lien on all the land originally conveyed, for the payment of the purchase money notes, and also to enforce the vendor's lien on the land sold to Henley, for the payment of the three thousand dollar note held as collateral security. The defendant demurred to the bill on the ground that the complainant had waived his lien by taking the note as collateral. The demurrer was overruled. The defendant then filed an answer averring that the complainant had waived his lien by taking the collateral; that the complainant by failing to protest and collect the note held as collateral had damaged the estate of the intestate to that extent, which should be taken as a payment; and that the estate of Stewart had been declared insolvent, and the purchase money notes owned by the complainant had not been filed as a claim against the estate. The defendant asked that his answer be considered as a cross-bill, and that it should be decreed that the complainant was not entitled to the relief asked, and that the chancellor deny any lien in favor of the complainant as to the land sold to Henley, and which was purchased by Hood under the decree declaring a vendor's lien in favor of his intestate on such land. A decree was rendered declaring the complainant entitled to the relief prayed for, and the defendant appealed.

O. R. Hood, for the appellant.

James Aiken, for the respondent.

576 HARALSON, J. 1. The defendant admits in his brief that complainant is entitled to a vendor's lien, to secure the original purchase money notes; but he contends that he waived this lien in accepting the three thousand dollar note of Henley and associates as collateral security to said original notes. Whether this contention is correct or not must depend on the intention of the parties in the transaction between them.

"A specific intention to reserve a vendor's lien, at the time the contract is made, is not necessary to its existence; it arises by implication, as an incident to the contract, unless there is satisfactory evidence of a purpose to exclude it: *Carver v. Eads*, 65 Ala. 190; *Sims v. National City Bank*, 73 Ala. 248. The lien exists independent of any such agreement, upon the equitable principle that in good conscience one man ought not to buy and retain the lands of another without paying the consideration money for which they were sold; and whoever resists the enforcement of the lien assumes the burden of showing that it has been intentionally displaced or waived by the consent of parties." If, under all the evidence, that question remains in doubt, the lien attaches: *Wilkinson v. May*, 69 Ala. 33; *Jones on Liens*, sec. 1064.

The fact that the notes recited that their consideration was the sale of land, and that the deed, the same day executed, describes the notes so taken as a consideration for the sale of the lands conveyed, evidence an intention of the parties that a vendor's lien should be retained, even in cases where collateral security had at the time been given: *Tedder v. Steele*, 70 Ala. 347. There is nothing in the fact that after Stewart sold lands on which the lien existed he voluntarily transferred to complainant, as collateral to his own notes, this three thousand dollar note of his vendees, to show that complainant, in accepting **577** the same for the purposes intended, waived his vendor's lien. Such transfer tended to show that Stewart intended thereby to place said note where it properly belonged—in the hands of him who held a prior lien on the lands, and to allow his said vendees to pay said note to complainant, and thereby, to that extent, discharge the lien on the property they had purchased, strengthening that far, and entirely, if sufficient to pay what should remain due on his notes, the integrity of their title to the same. It will not be presumed from the mere acceptance of said note as collateral to his debt that complainant intended to waive his lien, as he had an agreement with Stewart how his lien might be waived, which agreement the transfer of

this note did not in any wise impair: *Tedder v. Steele*, 70 Ala. 347. It is not pretended that the three thousand dollar note was not a lien on the land sold by Stewart to Henley and associates. That fact is admitted by defendant's counsel. The complainant, by its transfer to him, it is very clear, became entitled to the same rights to enforce the vendor's lien, on the lands for which it was given, for the payment of the same, that Stewart had: 3 Brickell's Digest, 615, sec. 88.

2. Stewart's estate was declared insolvent, and more than nine months had passed since the declaration of insolvency before the present bill was filed. Defendant insists that complainant failed to file the said original purchase money notes within nine months after the declaration of insolvency of said estate, and that such failure destroyed them as claims against the estate; that the vendor's lien on the lands for which they were given was thereby destroyed, and that the three thousand dollar note held by complainant as collateral security for their payment reverted to, and became the property of, defendant. But this contention is untenable. If it be true that these notes were not filed in time to entitle them to share in the distribution of the insolvent estate among creditors, that fact did not destroy the lien they operated for their payment, on the land for which they were given. The lands of a decedent on which valid subsisting liens are existing at his death do not pass into ⁵⁷⁸ the administration of his estate, whether solvent or insolvent, for distribution or the payment of debts, unaffected by such liens, but subject to them. They may be enforced against the lands by the parties in whose favor they exist. The creditors of an insolvent estate have no right or claim to the lands or the proceeds of them until such prior liens are satisfied; and the administrator, when it is to the interest of the estate to do so, may discharge them himself—for the purpose of reaching and utilizing the residuum—in the course of administration: *Patapsco Guano Co. v. Ballard*, 107 Ala. 710, 54 Am. St. Rep. 131, 19 South. 777; *McNeill v. McNeill*, 36 Ala. 110, 76 Am. Dec. 320; *Calhoun v. Fletcher*, 63 Ala. 574; *Stovall v. Clay*, 108 Ala. 105, 110, 20 South. 387..

Accordingly, it has been repeatedly decided in this court that a vendor's lien for the payment of the purchase money of lands is preserved, though the statute of limitations has operated a bar to the recovery of the purchase money as a debt: *Ware v. Curry*, 67 Ala. 274; *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38; *Flinn v. Barber*, 61 Ala. 530; *Shorter v. Frazier*,

64 Ala. 74. In the last case cited it was also held that the demand for its enforcement is "not stale, within the sense of that term, as used in courts of equity, unless its enforcement is delayed for twenty years after the purchase money becomes due and payable": *Terrell v. Cunningham*, 70 Ala. 100, 107. Nor can a failure of the vendor to present his lien notes to the administrator within the time required by the statute of non-claim, or to file them in the probate court within nine months after the declaration of insolvency of the estate, cut off the lien and remedy for its enforcement. Such failures would only operate to bar the right of the vendor to participate in the distribution of the estate: *Mahone v. Haddock*, 44 Ala. 92; *Flinn v. Barber*, 61 Ala. 530; *Smith v. Gillman*, 80 Ala. 296.

3. It is again insisted that complainant did not use due diligence in collecting the collateral note, and defendant was thereby damaged. A sufficient reply to this contention is found in the fact that if defendant was damaged by the neglect in this respect of the complainant ⁵⁷⁹ the defendant cannot recoup or set off such damages, without showing that such damages have been sustained and the amount thereof. There was no evidence introduced by him from which it could be reasonably ascertained that complainant did not use ordinary diligence to collect, or that defendant suffered any damage from him in this respect, and none to show the amount thereof, if any: *McGehee v. Slater*, 50 Ala. 431; *Sampson v. Fox*, 109 Ala. 662, 55 Am. St. Rep. 950, 19 South. 896.

There is no room for the consideration of the question of laches on the part of complainant, on the facts here presented, for not having filed his bill at an earlier period than he did.

From what has been said, it will appear that the demurrer to the bill was not well taken, and that the demurrer to the cross-bill of defendant was properly sustained. The grounds of demurrer in each case are sufficiently covered by the principles above announced, and, except as noticed, they are not insisted on.

We have considered such of the errors assigned as have been insisted on in argument. Finding no error in the decree below of which defendant can complain, let it be affirmed.

Vendor's Lien—Waiver of.—The burden of showing the waiver of a vendor's lien is on the vendee: *Selna v. Selna*, 125 Cal. 357, 73 Am. St. Rep. 47, 58 Pac. 16; *Crampton v. Prince*, 83 Ala. 246, 3 Am. St. Rep. 718, 3 South. 519. The lien is not waived by taking the note of the grantee for the purchase money remaining

unpaid: *Maroney v. Boyle*, 141 N. Y. 462, 38 Am. St. Rep. 821, 36 N. E. 511; *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88, 6 S. W. 897. See, also, *Mansfield v. Dameron*, 42 W. Va. 794, 57 Am. St. Rep. 884, 26 S. E. 527. But it is presumed to be waived by taking other or collateral security: *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57, 5 South. 164; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Marshall v. Christmas*, 8 Humph. 616, 39 Am. Dec. 199.

Vendor's Lien—Limitations.—A vendor's lien for the unpaid purchase money of land is not lost because the statute of limitations has barred an action on notes given therefor: *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38. Though it has been held that as against a remote vendee a vendor's lien does not subsist after the statute has run against the purchase money notes, and the first vendee cannot extend the lien by payments upon the notes: *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181.

QUEEN CITY STOCK AND GRAIN COMPANY v. CUNNINGHAM.

[128 Ala. 645, 29 South. 583.]

INJUNCTION.—POLICE SURVEILLANCE of a supposed gambling resort will not be enjoined at the suit of one who has places of business in the same building, on the ground of injury to his business. (pp. 165, 166.)

Bradley & Morrow, for the appellants.

C. W. Hickman and E. N. Hamill, for the respondents.

647 **McCLELLAN, C. J.** The pith of this bill is that Austin, as chief of police of Birmingham, stationed Cunningham, a police officer, at a place on a street of the city which commanded a view of the side door of Hewlett's saloon and of a stairway leading to the floor above, where Hewlett carried on a "stock exchange," commonly known as a bucket-shop, and directed him, said Cunningham, to take down the names of persons entering the saloon by that door or ascending to the bucket-shop by the stair, and that Cunningham carried out these directions and thereby irreparably injured both the saloon and bucket-shop business of the complainants, and was continuing so to do, so that intending patrons by the back door of the saloon and intending customers of the bucket-shop were deterred from their purposes in this regard, to the diminution of each of said businesses and consequent loss of profits to the complainants.

The sworn answer of Austin and Cunningham makes it clear that, while the latter was stationed at the place averred in the bill, it was not for the purpose of taking down the names of persons entering the saloon or ascending to the bucket-shop, but only for the purpose of identifying and taking down the names when known to the officer of persons who ascended by that stair and another near by into a room or rooms on the third floor of Hewlett's building, which the police authorities had good cause to believe were unlawfully occupied and used for gambling purposes; that the officer was stationed at this place at 8 P. M., after the bucket-shop was closed and all lights on the second floor had been extinguished, and while those on the third floor were alight, and remained until midnight, during which interval only persons going to the third floor passed up the stairway, and that Cunningham had no instructions, and did not in fact seek, to identify persons going into the saloon or up to the bucket-shop, and did not at any time take down the names of such persons.

The relief sought is injunctive of the alleged espionage of Austin and Cunningham upon the patrons of the saloon and bucket-shop. A preliminary writ issued. Respondents moved to dissolve ⁶⁴⁸ the injunction on the grounds: 1. That there was no equity in the bill; and 2. That the answer denied the material allegations in the bill. On the hearing of this motion the complainants filed *ex parte* affidavits intended to refute the denials of the answer. Whether this is a case proper for such affidavits on a motion to dissolve on the denials of the answer, we do not determine. Taking the affidavits into consideration, we do not find that they, when closely analyzed and the sidelights which they throw on the situation are given due weight, meet and overturn, or indeed materially weaken, the denials of the answer. So that virtually the case stands upon bill and answer, and motion to dissolve the injunction on the two grounds stated above.

We do not consider the first ground, viz., that the bill is without equity. The action of the court dissolving the injunction may well be justified on the second, the denials of the answer, and upon that ground we rest our concurrence with the chancellor. The officer had, of course, the right to be and remain where he was, in a public street. Indeed, the public at large had the right to be there in any number short of obstructing the thoroughfare. It may well have been that it was the officer's duty to be and remain there in the surveillance

incident to his office. The answer, indeed, shows affirmatively that it was his duty, and even the bill itself avers nothing to the contrary. The right of the officer was in no degree impeached by the fact that the position commanded a view of persons entering complainants' places of business, nor was his duty less clear by reason of the indisposition of complainants and their patrons for the latter to be seen going into or coming out of such places. On the denials of the answer the officer in no way interfered with or molested these patrons further than was, in their supersensitiveness, incident to their coming within the range of his vision. And the affidavits show nothing to the contrary. He did not take their names, he did not set down the names even of those he knew, he did not seek to identify them. It was only the supposed blight of his supposed evil or inimical eye as it casually fell upon them in the line ⁶⁴⁹ of his official outlook for other persons, properly under his surveillance, that is in fact complained of and sought to be enjoined.

It has been held that a police officer, in the exercise of his right and the performance of his duty of surveillance for the prevention or detection of reasonably apprehended crime or disorders, may station himself in the place of business of the citizen and remain there during business hours: *Weiss v. Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81; but, however that may be, he certainly has a right, and it is his duty, to do what the answer shows Cunningham to have done. Upon the foregoing considerations, and without looking to the equity of the bill or the sufficiency of the denials of the answer as to the alleged injury to the complainants, we hold that the preliminary injunction was properly dissolved.

Affirmed.

Injunctions.—For recent applications of the law of injunctions, see *Atkinson v. Doherty*, 121 Mich. 372, 80 Am. St. Rep. 507, 80 N. W. 285; *Ex parte Warfield*, 40 Tex. Cr. Rep. 413, 76 Am. St. Rep. 724, 50 S. W. 933; *Flaccus v. Smith*, 199 Pa. St. 128, 85 Am. St. Rep. 779, 48 Atl. 894.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

MILLER v. DAVIS.

[69 Ark. 1, 64 S. W. 97.]

HOMESTEADS.—THE PROBATE COURT HAS NO JURISDICTION to order the sale of a decedent's homestead for the payment of the ordinary debts of the estate, and such sale is void. The only purpose for which a probate sale of the homestead can be ordered is for the payment of debts due in a fiduciary capacity. (p. 167.)

HOMESTEADS—PROBATE SALE OF—BURDEN OF PROOF.—In ejectment by minor heirs of a deceased homestead owner, the burden of proof rests on the person claiming the homestead under a probate sale thereof to show that it was made for the payment of a debt of a fiduciary nature. (p. 169.)

The minor heirs of A. J. Cravens sued in ejectment to recover a tract of land owned and occupied by him as his homestead at the time of his death. Subsequently, by order of the probate court, the land was sold to pay the debts of the estate, and the appellant, J. Miller, Jr., claims under such sale. Judgment for plaintiffs and Miller appealed.

P. H. Crenshaw, for the appellant.

Phillips & Campbell, for the appellee.

* **RIDDICK, J.** It has been settled by repeated adjudications in this state that the probate court has no jurisdiction to order the sale of the homestead for the payment of the ordinary debts of the estate. This was the law under the constitution of 1868, as well as under our present constitution: *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119, 20 S. W. 525; *Burgett v. Apperson*, 52 Ark. 213, 12 S. W. 559; *McCloy*,

v. Arnett, 47 Ark. 445, 2 S. W. 71; Booth v. Goodwin, 29 Ark. 633.

The homestead does not go to the administrator as one of the assets of the estate for the payment of debts, but, after the death of the owner thereof, passes to his widow and children, to be held by them exempt from the debts of the estate during the period provided by law. If, during this period, the probate court attempts to sell it for the payment of the debts of the estate, the sale, as a general rule, is void. To this rule there are exceptions, and one of them is that the homestead is not exempt from sale for debts due in a fiduciary capacity: *Gilbert v. Neely*, 35 Ark. 24. As to such debts, there is no homestead exemption. But, as the jurisdiction of the probate court to order the sale of the homestead is limited to exceptional cases when the debts for the payment of which the sale is ordered are of a certain kind, the burden in an action of ejectment rests on the party claiming the homestead land under such a sale to show that it was made for the payment of a privileged debt. * *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423. It is not enough to show that among the debts of the estate there were fiduciary or privileged debts for which the homestead might have been sold. It must appear from the record of the proceedings in the probate court, or in some other legitimate way, that the order for the sale of the homestead was in fact made for the purpose of paying such a debt. As probate judges in this state are not required to be learned in the law, the substance, rather than the form, of the record will be regarded, but there should be enough to show that the debt for which the homestead is ordered sold is one for the payment of which it is not exempt: *Howe v. McGivern*, 25 Wis. 525; *Daudt v. Harmon*, 16 Mo. App. 103; 1 *Woerner on American Law of Administration*, sec. 102.

Now, it appears from the testimony in this case that among the debts probated against the estate of Cravens were debts which he owed as guardian for funds in his hands belonging to his wards. But there does not seem to have been any petition filed or order made to sell the homestead for the special purpose of paying these fiduciary debts. So far as the record discloses, there was no finding or judgment of the probate or other court that Cravens owed debts as a trustee, and no order made for the sale of the homestead to pay such debts. The estate owed many debts besides these trust debts, and the homestead, with the other lands of the estate, was ordered sold to

pay the debts of the estate generally. Although it was shown that a portion of the debts for which the homestead was sold was trust debts, the evidence did not show that the other debts for the payment of which the homestead was sold were debts for which the homestead was liable. It is true the administrator, Mr. Thornburgh, testified that "a large part of the indebtedness" of the estate was of a fiduciary character, and that the judgments against the estate on account of such debts "amounted to more than the available assets of the estate outside of the lands." Counsel for appellant, in their brief on motion to rehear, call attention to the claims which this witness said were fiduciary debts, and then proceed to say that "there is nothing in the transcript to show that any of the other claims were not fiduciary debts." But the amount of these claims, the nature of which, counsel say, is not shown in the transcript, is considerable. The total amount of the claims probated against the Cravens estate was something over six thousand dollars. Now, even if we concede that the word "guardian," or other like word, which in some instances follows the name of the person to whom the claim belongs, as shown on the list of claims copied in the transcript, "proves that such debts were of a fiduciary character, yet all these debts, with those which Mr. Thornburgh said were of that kind, amount to only about four thousand dollars, leaving, according to our computation, at least two thousand dollars of the claims probated against the estate of Cravens the nature of which is not shown. There is nothing to show that these last-mentioned claims were or were not fiduciary debts. In noticing this point counsel for appellant, in their brief on motion to rehear, say: "Whether the debts were all fiduciary or not, no one can possibly say from this transcript, but that was a question on which the probate court necessarily passed judgment; for, in the absence of proof of the fiduciary character of the debts, no order of sale could be made." The answer to this argument is, to repeat what we have before stated, that the homestead was not an asset in the hands of the administrator. The probate court had no jurisdiction to order it sold except for debts of a certain kind. The burden of proof to show that the court had jurisdiction to sell the homestead was on the defendant, who claimed it under the probate sale. He did not show this or show any adjudication of the questions presented here by the probate court. The evidence did not show that all the debts for the payment of which the land was sold were trust debts.

Neither the petition for the sale nor the judgment of the probate court ordering the sale was introduced in evidence. We therefore do not know that the probate court ever undertook to determine that all of the debts probated were fiduciary debts, or that the homestead was ordered to be sold for the payment of fiduciary debts only. On the contrary, the administrator's report of sale and the agreed statement of facts tend, as we think, to show that the questions whether the land was a homestead and whether the debts were trust debts were not presented to or determined by the probate court, but that this land, which had been used as a homestead, and other lands of the estate were sold to pay the debts of the estate generally, without any reference to whether they were or were not fiduciary debts. In other words, so far as we can ascertain from the transcript, the probate court made no distinction between the homestead and other lands, but ordered all the land of the estate, including the homestead, sold to pay the debts probated against the estate, without regard to their nature. As a large portion of these debts are not shown to have been of a fiduciary nature, it does not appear that the homestead was liable for such debts, or that the probate court had any power to order it sold in that way. We are therefore ⁵ of the opinion that the circuit court correctly held that the sale was void.

We do not regard the case of *Huffstedler v. Kibler*, recently decided by this court (67 Ark. 239, 54 S. W. 210), as in conflict with our conclusion here, for the opinion in that case states that the trust debts "were substantially all that were probated against the estate," and the homestead was sold to pay those fiduciary debts. If this statement was correct, the judgment in that case was right; if not correct, there was a mistake of fact in that case, which does not affect the rule of law laid down.

Counsel for appellant contend that the evidence shows that Cravens left surviving him at least six children, and that therefore the two appellees are only entitled to two-sixths of the land, instead of the one-half interest for which they recovered judgment. But the answer of appellant admits that, at the commencement of the action only four of the children were living, and we infer from statements in the answer that the other heirs died without issue.

On motion to rehear, counsel for appellant have discussed the question as to whether the rights of plaintiffs were barred by limitation, and also the right of defendant to subrogation, but, as no reference to these questions was made in the orig-

inal brief, so as to call for a decision of the court thereon, it is, under the rules, too late to insist on them now. We deem it unnecessary to consider them also, for the reason that the cross-complaint of defendant asking for subrogation was dismissed without prejudice, and he is free to assert the rights to which he is entitled on that ground in another proceeding.

We are therefore of the opinion that the judgment of the circuit court should be affirmed, and it is so ordered.

Probate Homestead.—An order of a probate court directing the sale of the homestead of a decedent is void, if made during the minority of the children or while the widow is unmarried and has not abandoned the homestead. During this time the homestead is exempt from sale for the payment of the debts of the deceased owner: *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119, 20 S. W. 525; *Kessinger v. Wilson*, 53 Ark. 400, 22 Am. St. Rep. 220, 14 S. W. 96. See, in this connection, *J. B. Watkins Land etc. Co. v. Mullen*, 62 Kan. 1, 84 Am. St. Rep. 372, 61 Pac. 885.

BROWN v. ENNIS.

[69 Ark. 123, 61 S. W. 379.]

HOMESTEADS—PURCHASE MONEY LIEN.—If a note given for a part of the purchase money of land is used by the vendor to pay another note due from him, the consideration of the purchase money note is not changed, nor is the land exempt as the vendee's homestead from liability for its payment. (p. 173.)

Leming & Hon, for the appellants.

G. S. Evans, for the appellees.

123 BATTLE, J. Is the land constituting the homestead of W. H. Ennis and Martha Ennis exempt from sale under the execution issued upon the judgment recovered by S. C. Brown against W. H. Ennis?

The constitution of this state ordains: "The homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution, or other process thereon, except such as may be rendered for the purchase money, or for specific liens," etc.: Const., art. 9, sec. 3.

In *Acruman v. Barnes*, 66 Ark. 442, 74 Am. St. Rep. 104, 51 S. W. 319, it was held that "money borrowed for the pur-

pose of buying a home, and so used, is purchase ¹²⁴ money, within the exception to article 9, section 3 of the constitution of 1874, exempting homesteads; and in case of the destruction of the residence by fire the borrower cannot hold the insurance money due on a policy taken by him for his own benefit exempt from seizure on process of garnishment or execution for the debt due the lender."

In *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865, the facts, in part, are as follows: On August 23, 1890, one Daily and wife owned a certain tract of land, and executed a mortgage thereon to secure a note given by them to the Lombard Investment Company for a \$500 loan. On November 12, 1892, Daily and wife sold the land to one Donaldson for \$1,800, "subject to the \$500 mortgage in favor of the Lombard Investment Company." On December 21, 1892, Donaldson executed a mortgage on the property to Hoover & Brother for \$726, subject to the Lombard mortgage. In April, 1893, A. Farnsworth purchased the land from Donaldson for \$2,000, paying \$800 in cash, and executing his note for \$1,200. In the summer of 1894, Donaldson, learning that Farnsworth would be unable to pay his note at maturity, assisted him in negotiating a contract with Hoover & Brother, to which Donaldson and Farnsworth were parties. By this contract Hoover & Brother undertook to purchase the Lombard mortgage. Donaldson and wife were to execute a warranty deed to Farnsworth, and surrender his note for the \$1,200; and Farnsworth was to execute his notes to Hoover & Brother for the aggregate amount due on the Donaldson and Lombard mortgages. Hoover & Brother purchased the Lombard mortgage. In December, 1894, Farnsworth executed his notes to Hoover & Brother for the amount due on the mortgages. Donaldson and wife conveyed the land to Farnsworth, and Farnsworth and wife executed a mortgage to secure Farnsworth's notes. Mrs. Farnsworth did not join her husband in the granting clause of the mortgage, nor did she release her homestead in the body of the mortgage, nor did she acknowledge the execution of the same, and in the acknowledgment release and relinquish her homestead rights in the land. At the time she and her husband executed the mortgage, they resided on the land as their homestead. Afterward an action was brought by Hoover & Brother against Farnsworth and wife to foreclose the mortgage, and the defendants pleaded, among other things, that it was void because the wife did not join in the execution of the mort-

gage; and the question arose, this being true, Was not the mortgage nevertheless valid, it being given to secure the purchase money for which the land mortgaged ¹²⁵ was sold? In discussing this question, the court said: "The court found that the mortgage from Farnsworth and wife was invalid. Sandel and Hill's Digest, section 3713, provides: 'No conveyance, mortgage, or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument, and acknowledges the same.' The contract between Donaldson, Farnsworth, and Hoover & Brother, by which Donaldson and wife were to execute a warranty deed to Farnsworth, and Farnsworth was to execute his notes to Hoover & Brother, as set forth in the statement of facts, however circuitous the method, was tantamount to an advancement by Hoover & Brother to Farnsworth of the purchase money to the amount of these mortgages. For, according to the agreement, it was only by paying off these mortgages that Farnsworth was to get his warranty deed from Donaldson to the land. The execution of the mortgage from Farnsworth to W. G. Hoover & Brother to secure the amount of these mortgages, simultaneously with the execution of the deed from Donaldson to Farnsworth, was in reality nothing more nor less, in effect, than a mortgage to secure the purchase money. It was, in legal effect, the same as if Hoover & Brother had taken the deed to themselves from Donaldson, and then conveyed the land to Farnsworth, and taken a mortgage back to secure the amount of the Donaldson and Lombard mortgages, which represented the purchase price Farnsworth was to pay for the land."

In the case before us W. H. Ennis executed his note, payable to S. C. Brown, for \$85 of the \$500 which he agreed to pay one Bodiford for the land he (Ennis) purchased from Bodiford. This note was received by Brown in payment of a note which Bodiford had executed to him for a horse. The fact that the note of Ennis was used to pay a note which was given for a horse did not change its consideration. If it did, how were the \$85 which Ennis agreed to pay for the land satisfied? The \$85 were set apart for the payment of the Bodiford indebtedness to Brown, and were appropriated to that purpose by Ennis executing his note to Brown for that amount. Eighty-five dollars of the purchase money for the land have never been paid. Bodiford caused it to be transferred to Brown to pay his in-

debtedness, and Brown is seeking to collect it by selling the land under execution. He is entitled to do so. The land, although it is the homestead of Ennis and his wife, is not exempt: *Boone County Bank v. Hensley*, 62 Ark. 398, 35 S. W. 1104.

¹²⁶ So much of the decree of the circuit court as directs the clerk to issue a supersedeas is reversed, and the cause is remanded, with instructions to the court to modify its decree in accordance with this opinion.

LIEN FOR PURCHASE MONEY OF HOMESTEADS.

I. Vendor's Lien, Generally.

- a. Mortgage for Purchase Price.
- b. Purchase Money of Part of Tract.

II. Assignment of Purchase Money Debt.

III. Money Paid for Land by Third Person.

IV. Money Borrowed to Pay Purchase Price.

- a. Cases Holding Borrowed Money a Lien.
- b. Cases Holding Borrowed Money not a Lien.

V. Outstanding Title or Removal of Encumbrance.

I. Vendor's Lien, Generally.

It is universally conceded that the homestead exemption does not extend so far as to exclude the sale of the property claimed as exempt to satisfy the lien existing against it in favor of the vendor for the unpaid purchase money. Therefore, no homestead right can be acquired in land upon which the purchase money is due and unpaid as against the lien of the vendor therefor; the land may be impressed with the homestead character, but remains subordinate to such lien, whether created by mortgage or otherwise, until removed in some lawful manner. Or, to state the rule differently, until the purchase money is paid, the vendee has not such an estate in the land as will support the homestead right and exemption, as against the vendor to whom such money is due. This rule is undoubted, and to this effect the authorities are numerous and uniform: *White v. Simpson*, 107 Ala. 386, 18 South. 151; *Tunstall v. Jones*, 25 Ark. 272; *Montgomery v. Tutt*, 11 Cal. 190; *McHendry v. Reilly*, 13 Cal. 75; *Skinner v. Beatty*, 16 Cal. 156; *Williams v. Young*, 17 Cal. 403; *Spargar v. Cumpton*, 54 Ga. 355; *Cook v. Cook*, 67 Ga. 381; *Perdue v. Fraley*, 92 Ga. 780, 19 S. E. 40; *Bush v. Scott*, 76 Ill. 524; *Barnes v. Gay*, 7 Iowa, 25; *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493; *Cole v. Gill*, 14 Iowa, 527; *Burnap v. Cook*, 16 Iowa, 149, 85 Am. Dec. 507; *Andrews v. Alcorn*, 13 Kan. 351; *Nichols v. Overacker*, 16 Kan. 54; *Greeno v. Barnard*, 18 Kan. 518; *Purcell v. Dittman*, 81 Ky. 149; *Reynolds v. Williams*, 9 Ky. Law Rep. 112, 4 S. W. 178; *Moss v. Hall*, 1 Ky. Law Rep. 314; *Smith v. Gerody*, 3 Ky. Law Rep. 538; *Suc-*

cession of Foulkes, 12 La. Ann. 537; Ventress v. Collins, 28 La. Ann. 782; New England Jewelry Co. v. Merriam, 2 Allen, 399; Stevens v. Stevens, 10 Allen, 146, 87 Am. Dec. 630; Buckingham v. Nelson 42 Miss. 417; Smith v. High, 85 N. C. 93; Toms v. Fite, 93 N. C. 274; Dortch v. Benton, 98 N. C. 190, 2 Am. St. Rep. 331, 3 S. E. 638; Ulrich's Appeal, 48 Pa. St. 489; Fehley v. Barr, 66 Pa. St. 196; Calhoun v. Calhoun, 2 S. C. 283; Bentley v. Jordan, 3 Lea, 353; Farmer v. Simpson, 6 Tex. 303; Stone v. Darnell, 20 Tex. 14; Buford v. Rosenfield, 37 Tex. 42; Joplin v. Fleming, 38 Tex. 527; Woolfolk v. Rickets, 41 Tex. 358; Berry v. Bogges, 62 Tex. 239; Brightman v. Fry, 17 Tex. Civ. App. 531, 43 S. W. 60; Perrin v. Sargeant, 33 Vt. 84.

There can be no homestead right acquired in property as against the purchase money unless the lien therefor, whether created by mortgage or existing by way of a vendor's lien, has been relieved in some lawful way, Hopper v. Parkinson, 5 Nev. 233. "Indeed, there is no homestead exemption law as against purchase money. As to purchase money the homestead is just like any other real estate, and governed by the same rule as other real estate. A homestead may be sold on execution for the purchase money": Greeno v. Barnard, 18 Kan. 521. A vendor of land, in the absence of an agreement to the contrary, and without taking some independent security, retains a lien for the purchase price, though he may execute an absolute conveyance to the purchaser, and such lien is superior to the right of a homestead exemption in such land: White v. Simpson, 107 Ala. 387, 18 South. 151. And if the lien of the vendor for the purchase money has attached to property before it acquired its character of homestead, neither husband nor wife can hold the property except in subordination to such lien: Williams v. Young, 17 Cal. 403. So, if the purchaser of realty pays the purchase price, and then borrows from the vendor, who retains in his deed a lien to secure such loan, referring to it as the purchase price, the lien so created is valid, though the land is used as a homestead: Jones v. Male (Tex. Civ. App.), 62 S. W. 827. The fact that the land occupied as a homestead has depreciated in value below the amount of an unpaid balance of the purchase price does not relieve the land of the vendor's lien: Cook v. Crocker, 53 Ga. 66. If the vendee agrees with the vendor to pay a note which the latter owes to a third person, as part of the purchase price of land, the land is subject to the payment of such debt, though claimed as a homestead: Fox v. Brooks, 88 N. C. 234. Or, if the vendor takes the notes of a third person indorsed by the vendee as part payment of the purchase price of a homestead, the land is liable therefor: Whitaker v. Elliott, 73 N. C. 186. The contrary doctrine is maintained in Thurston v. Maddocks, 6 Allen, 427. An executory contract for the sale of land is valid and may be enforced as security for the payment of the unpaid pur-

chase money, although not signed by the wife of the purchaser, and although the land was purchased for and immediately occupied as a homestead: *Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791; *Jackson v. Phillips*, 57 Neb. 190, 77 N. W. 683.

The right to a vendor's lien for unpaid purchase money may be abrogated by statute, and a statute providing that a homestead, in the event of the death of its owner without having lawfully devised the land, descends to his heirs free of all claims or liens, with certain exceptions, not including liens for unpaid purchase money, abrogates as to such property the common-law right to acquire a vendor's lien thereon for the unpaid purchase money: *Berger v. Berger*, 104 Wis. 282, 76 Am. St. Rep. 877, 80 N. W. 585.

In South Dakota the court has maintained that under a statute by express terms exempting a homestead "from all process, levy, or sale" land occupied as a homestead is not liable to forced sale in satisfaction of a debt due the vendor for the purchase money of the land: *Northwestern Loan etc. Co. v. Jonasen*, 11 S. Dak. 566, 79 N. W. 840.

a. **Mortgage for Purchase Price.**—It is a rule of universal application that the homestead right cannot attach as against a mortgage executed to the vendor contemporaneously with the sale of the land, to secure the payment of the purchase money: *Moses v. Home Bldg. etc. Assn.*, 100 Ala. 465, 14 South. 412; *Dillon v. Byrne*, 5 Cal. 455; *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322; *Montgomery v. Tutt*, 11 Cal. 190; *Shinn v. Macpherson*, 58 Cal. 596, *Van Sandt v. Alvis*, 109 Cal. 165, 50 Am. St. Rep. 25, 41 Pac. 1014; *Hawkes v. Hawkes*, 46 Ga. 204; *Andrews v. Alcorn*, 13 Kan. 352; *Nichols v. Overacker*, 16 Kan. 54; *Soulier v. Benker*, 37 La. Ann. 162; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Jones v. Tainter*, 15 Minn. 512; *Hopper v. Parkinson*, 5 Nev. 233; *Cornish v. Frees*, 74 Wis. 490, 43 N. W. 507. A husband can encumber the homestead by mortgage in the acquisition of it independently of his wife, and homestead rights cannot obtain so long as the encumbrance lasts. He can also renew such encumbrance or change it, at discretion: *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170, 20 S. W. 997. The fact that the wife of the mortgagor does not join in the mortgage gives her no right to claim a homestead as against such mortgage: *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322; *Williston v. Schmidt*, 28 La. Ann. 416; *Cohen v. Ripy*, 17 Ky. Law Rep. 1078, 33 N. W. 625. The reason for the rule has been thus stated to be "that a mortgage given for the purchase money of land, and executed at the same time that the deed is executed to the mortgagor takes precedence of a judgment against the mortgagor. The execution of the deed and mortgage being simultaneous acts, the title to the land does not for a moment rest in the purchaser, but merely passes through his hands

and vests in the mortgagee, without stopping at all in the purchaser, and during such instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment rather than any supposed equity which the vendor might be supposed to have for the purchase money, though that consideration may have originated the rule at first": *Curtis v. Root*, 20 Ill. 57. The mortgagor, by redeeming from foreclosure for part of the purchase price, cannot hold the land free from the lien for the part not satisfied: *Campbell v. Maginnis*, 70 Iowa, 589, 31 N. W. 946.

b. **Purchase Money of Part of Tract.**—If the debt is for any part of the purchase money of the whole land in which a homestead has been taken, the entire homestead is subject thereto, but if the debt is for the purchase money of a part of the homestead, only that part is subject therefor: *Cook v. Cook*, 67 Ga. 381. The fact that a debt sought to be collected by the sale of land, a part of which has been set apart as a homestead, is only for a part of the purchase money therefor, the balance having been paid, does not entitle the homesteader to an apportionment. The entire tract must be paid for before a homestead can be taken in any part of it: *Sale v. Wingfield*, 55 Ga. 622; *Lamb v. Mason*, 50 Vt. 345. If a person purchases several parcels of land for a gross price, paying part down and giving a mortgage on one of the tracts for the balance of the purchase money, and on sale under foreclosure it does not satisfy the debt and a decree is taken for the balance, under which another of the tracts is sold under execution, the purchaser is not entitled in equity to set aside the sale of the last tract on the ground that it is occupied as a homestead, as there can be no homestead right as against the purchase money due on the entire tract purchased: *Bush v. Scott*, 76 Ill. 524.

II. Assignment of Purchase Money Debt.

The rule established by the great weight of authority is, that the assignee of a note or mortgage given for the purchase money of a homestead is subrogated to the rights of the vendor, and has a lien as against the right of homestead exemption in the vendee. The vendor's lien is an incident to the debt contracted for the purchase money, passing to the assignee of the debt, who may enforce it the same as if it were in the hands of the vendor: *White v. Simpson*, 107 Ala. 386, 18 South. 151; *Boone Co. Bank v. Hensley*, 62 Ark. 398, 35 S. W. 1104; *Chambliss v. Phelps*, 39 Ga. 386; *Lane v. Collier*, 46 Ga. 580; *Green v. Oldham*, 10 Ky. Law Rep. 889, 11 S. W. 73; *Suit v. Suit*, 78 N. C. 272; *Bentley v. Jordan*, 3 Lea, 353; *Hicks v. Morris*, 57 Tex. 658. If a lien appearing to be for the purchase money is created on land of a homestead character, a good faith purchaser of the debt secured by such lien may enforce it against the land: *Jones v. Male* (Tex. Civ. App.), 62 S. W. 827. An assignee of notes for the purchase money of land, the lien being carried by the assignment,

does not waive his lien by accepting personal security unless it appears that he intended to do so, and so long as the purchase money can be traced, no matter how often the evidence of the debt is changed, the lien therefor cannot be defeated by a claim to a homestead: *Bradley v. Curtis*, 79 Ky. 327.

In *Murray v. Davis*, 9 Ky. Law Rep. 507, 5 S. W. 569, it appeared that the purchaser of land for a homestead gave his note, specifying that it was for the purchase price, and the payee assigned to a third person, who surrendered it to the maker and took a new note, also specifying that it was for the purchase price of the land, and this note was assigned to another person, who was held entitled to sell the land for its payment, while the maker could not enforce a homestead exemption against it.

So, if the assignee of notes given for a part of the purchase price of land by an arrangement with the principal maker, who is also the purchaser, surrenders the notes and takes from him in lieu thereof the note of the purchaser alone, with a trust deed on the land to secure the note, the debt will be unchanged, and remains a debt incurred for the purchase money: *Williams v. Jones*, 100 Ill. 363.

If a note given for the purchase price of land goes into the hands of a third person, and while he holds it, it is renewed by the maker and a party added to it as security, and the new note is made payable to such holder, this is not such a novation of the original contract as that a homestead laid off in the land cannot be levied on and sold to satisfy a judgment founded on the renewed note, as the debt is still for the purchase price of the land: *Wofford v. Gaines*, 53 Ga. 485. So a note payable to the vendor or bearer, given for the purchase money of land and transferred to a third person and renewed from time to time, the last renewal note being reduced to judgment, the land is subject thereto as against a homestead in the same land claimed and set up by the vendee, the maker of the note and defendant in the judgment: *McElmurray v. Blue*, 91 Ga. 509, 18 S. E. 313. In *Perry v. Ross*, 104 Cal. 15, 43 Am. St. Rep. 66, 37 Pac. 757, however, it was maintained that if a husband in possession of land, after filing a declaration of homestead thereon, enters into a contract for its purchase, his assignment of the contract to secure borrowed purchase money does not create a lien on the land, or convey to the lender either the contract right, or the equitable title, although the declaration is filed before the purchase is made.

III. Money Paid for Land by Third Person.

Money paid for land by third person directly to the grantor for the grantee is generally considered purchase money as against the homestead right of the grantee, and entitles the person so advancing the purchase money to be subrogated to all of the rights of the grantor as regards the vendor's lien: *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865; *Carr v. Caldwell*, 10 Cal. 380,

70 Am. Dec. 740; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Allen v. Hawley*, 66 Ill. 164. A homestead cannot be claimed as against one who pays off for the homestead claimant notes executed by the latter for the purchase money of the land claimed as a homestead; *Harrod v. Johnson*, 5 Ky. Law Rep. 247. If a person advances the purchase money for a homestead occupied by the vendee, upon his promise to execute a mortgage to secure the repayment of such money when he obtains a deed, and he afterward refuses to do so, the purchase money so advanced becomes a lien against the homestead, and may be enforced by the person advancing the money, and against it the vendee cannot maintain a homestead right: *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571. A mortgage on land executed to secure money advanced directly to the vendor to pay for land occupied by the vendee as a homestead constitutes a lien on such land, although the mortgagor's wife fails to join in the execution of the mortgage. Money so advanced must be considered as purchase money: *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865; *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Brunting v. Jones*, 78 N. C. 242.

In *Tyler v. Jewett*, 82 Ala. 98-99, 2 South. 905, the contrary doctrine is announced, and the court there said: "It appears, however, that, by request of complainant, defendant paid his vendor one hundred dollars in discharge and satisfaction of the purchase money for the lot. The generally accepted rule is, that the lien of the vendor for the purchase money is an encumbrance upon the homestead, against which the exemption does not prevail. Under our decisions, however, the payment of the purchase money by request of complainant did not operate to transfer the original demand to defendant, but extinguished it and created a new liability, defendant becoming a new and original creditor": Citing *Chapman v. Abrahams*, 61 Ala. 108. This doctrine was formerly announced in Texas, in the case of *Malone v. Kaufman*, 38 Tex. 455, maintaining that if a party advances money to relieve a homestead from a lien for unpaid purchase money, and takes a note and mortgage to secure its repayment, he is not thereby subrogated to the rights of the vendor, and the homestead relieved from the lien for the purchase money. This rule was, however, repudiated in later Texas cases, it being held in *Hicks v. Morris*, 57 Tex. 658, that money advanced to pay the unpaid purchase money of a homestead, for which a note is given declaring that it is executed for such purchase price, subrogates the holder of such note, when the money is applied in paying off the lien, to the rights of the original vendor. To the same effect is *Flanagan v. Cushman*, 48 Tex. 241. And again in *Warhund v. Merritt*, 60 Tex. 24, the rule was announced that one furnishing money with an agreement that it shall be used in discharging a debt due for the purchase of land, and it is so used, the person advancing the money is subrogated to the rights of the

vendor of the land, and no homestead rights can be acquired therein until the debt is satisfied. To the same effect is the late case of *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559. The following rule is announced in *Carey v. Boyle*, 53 Wis. 581, 11 N. W. 47: "It must be understood that the extension of this equity to a third person is strictly confined to those who furnish or advance the purchase money to the purchaser in such manner that they can be said either to have paid it to the vendor, personally, or caused it to be paid on behalf or for the benefit of the purchaser, and to this extent they become parties to the transaction. It must not be a general loan to be used by the purchaser to pay the consideration of the purchase or to be used for any other purpose at his pleasure. In such case, the simple fact that the money can be traced into the land as having been paid by the purchaser to the vendor as the whole or part of the purchase price gives the person who loaned it no such right. This is the distinction made in many of the cases, and especially by the supreme court of Illinois. In *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254, the purchaser procured a third person to pay the purchase money for land which became part of the homestead of the purchaser, and it was held that it became a lien upon the homestead. A distinction was taken between such a case and one where the money was loaned to pay a pre-existing debt created for the purchase of the homestead. In *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571, the money was paid by the third person directly to the agent of the vendor upon notes given for the purchase money by the purchaser, and it was held an equitable lien upon the homestead and within the meaning of the statute. In *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537, it was a general loan which was used in paying the purchase money, and it was held no lien": *Carey v. Boyle*, 53 Wis. 582, 11 N. W. 47.

IV. Money Borrowed to Pay Purchase Price.

Closely allied to the topic just considered is the question whether money loaned by a third person to the vendee to enable him to purchase a homestead, or to complete the payment of one already purchased, or loaned him generally, and by him invested in a homestead, entitles the person thus loaning to be subrogated to the rights of the vendor, and to enforce the lien against the homestead. This is a question upon which there is a great and irreconcilable conflict of opinion. We think the true rule should be as laid down in *Bradley v. Curtis*, 79 Ky. 327, that so long as money loaned the vendee can be traced as purchase money for the land, no matter what the evidence of the debt may be, or how often it may be changed, the lien therefor cannot be defeated by a claim to a homestead, and the person loaning the money is subrogated to the rights of the vendor to enforce such lien.

a **Cases Holding Borrowed Money a Lien.**—Among the cases which sustain what to us seems the more equitable rule, that one

who loans money to the vendee with which the purchase money of land is paid off, or who loans money with which to pay off a mortgage given to secure the payment of purchase money of land claimed as a homestead, and who takes a new mortgage from the husband alone for the money loaned, is entitled to all the rights of the first mortgagee or the vendor: *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322; *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Van Sandt v. Alvis*, 109 Cal. 165, 50 Am. St. Rep. 25, 41 Pac. 1014; *Sale v. Wingfield*, 55 Ga. 622; *Middlebrooks v. Warren*, 59 Ga. 230; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Beal v. Harrington*, 116 Ill. 113, 4 N. E. 664; *Pratt v. Topeka Bank*, 12 Kan. 570; *Nichols v. Overacker*, 16 Kan. 54; *Coleman v. Parrott*, 17 Ky. Law Rep. 814, 32 S. W. 679; *Hicks v. Morris*, 57 Tex. 658; *Warhund v. Merritt*, 60 Tex. 24; *Lennox v. Sanders* (Tex. Civ. App.), 54 S. W. 1016. If a portion of a loan for which a mortgage on a homestead is given is by agreement of the parties used to pay a vendor's lien on the homestead, the mortgagee is subrogated to the rights of the vendor: *Dixon v. National etc. Co.* (Tex. Civ. App.), 40 S. W. 541. Or if the maker of a vendor's lien note borrowing money for the purpose of taking up the lien note makes a mortgage upon the land and executes his note to secure the loan, the money so obtained being applied to take up the lien note, there is no time in which the lien does not continue upon the land, and the lien continues to exist to secure the note executed for the loan: *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559. If one purchases land, and on day of receiving his deed borrows money, which he applies in payment thereof, and shortly after, on the same day, executes a note for the borrowed money, the note is to be regarded as relating back to the time of the actual loan and as an existing debt at the time of the purchase, which is a lien upon the land, against which a claim of homestead cannot be set up: *Stevens v. Stevens*, 10 Allen, 146, 87 Am. Dec. 630. If money is borrowed to pay off the balance of purchase money due for land embraced in a homestead, and is used for that purpose, and a note given for the amount so borrowed, the homestead is subject to such debt: *White v. Wheelan*, 71 Ga. 533. Or, if money is borrowed and used to pay off a balance due for the purchase price of land secured by mortgage, and another mortgage on the same land containing a waiver of homestead, the lender of the money stands in the place of those two mortgagees and is entitled to be paid before the homestead exemption of the debtor can be claimed in the land: *McWilliams v. Bones*, 84 Ga. 203, 10 S. E. 724.

b. **Cases Holding Borrowed Money not a Lien.**—On the other hand, authority is not wanting to sustain what seems to us the harsh and inequitable proposition that money borrowed with a view of being used in the purchase of real estate, and which is so used and secured by a mortgage given on the land, does not, as between the borrower and lender, constitute a debt or liability incurred for

the purchase of the land, and that as against such a debt a homestead exemption may be claimed: *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Winslow v. Noble*, 101 Ill. 194; *Parrott v. Kumpf*, 102 Ill. 423; *Lear v. Heffner*, 28 La. Ann. 829; *Skaggs v. Nelson*, 25 Miss. 88; *Brodie v. Batchelor*, 75 N. C. 51; *Stansell v. Roberts*, 13 Ohio, 149; *Notte's Appeal*, 45 Pa. St. 361; *Calmes v. McCracken*, 8 S. C. 87; *Amick v. Amick*, 59 S. C. 70, 37 S. E. 39; *Loftis v. Loftis*, 94 Tenn. 232, 28 S. W. 1091; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47. In *Notte's Appeal*, 45 Pa. St. 361, it was maintained that the person so advancing the money is manifestly a loan creditor, and nothing more; that there is no privity between him and the vendor, and he is not entitled to a lien. To the same effect is *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Burnap v. Cook*, 16 Iowa, 149, 85 Am. Dec. 507. *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336, 34 Pac. 349, asserts that a debt created by a homestead owner by borrowing money of a third person without any special agreement or understanding that such borrowed money is to be used in the purchase of the homestead is not a lien against the homestead, and that it is exempt from the payment thereof. To the same effect: *Mitchell v. McCormick*, 22 Mont. 249, 56 Pac. 216. And again in *Johnson Co. Sav. Bank v. Carroll*, 109 Iowa, 564, 80 N. W. 683, the court decided that if it is no part of the contract between the parties that borrowed money used to pay for a homestead should be so used, the loaning creditor is not entitled to a lien on the homestead.

V. Outstanding Title or Removal of Encumbrance.

A husband, when already in possession of a homestead under a defective title, may, without the consent of his wife, acquire an outstanding paramount title or credit, the purchase price of which will be within the exception provided by statute allowing the enforcement of claims for purchase money against the homestead: *Cassell v. Ross*, 33 Ill. 244, 85 Am. Dec. 270. She may, however, defeat the enforcement of such lien by showing that the title thus acquired was not paramount to that under which the property was held before its acquisition: *Cassell v. Ross*, 33 Ill. 244, 85 Am. Dec. 270.

If a partner, to whom nothing is due from the firm or the other partner, owns a lot on which there is a mortgage, and after his wife has filed a declaration of homestead thereon, he secretly withdraws money from the firm and discharges the mortgage, the copartner is entitled to a decree adjudging the amount used in discharging the encumbrance a lien upon the land paramount to the homestead right: *Shinn v. Macpherson*, 58 Cal. 596. But a mortgage on a homestead to secure an attorney's fee is not a debt for which the homestead is subject, even if the services were rendered in a case involving the removal of an encumbrance on the land: *Collier v. Simpson*, 74 Ga. 697.

KLEIN v. GERMAN NATIONAL BANK.

[69 Ark. 140, 61 S. W. 572.]

TRIAL—CHANGE OF VENUE.—A provision in a statute that "any party to a civil action" may obtain a change of venue does not mean that any individual party may obtain such order, but refers to the parties as a class and includes all on that side. To be entitled to such change they must all join in or favor the application, with the exception of mere nominal or formal parties having no real interest. (p. 184.)

ALTERATION OF WRITINGS — PRESUMPTION — BURDEN OF PROOF.—The mere fact of an alteration appearing in an instrument does not per se raise any presumption either for or against its validity, nor does it cast upon the holder the burden of proof to show whether the alteration was made before or after its execution. (p. 184.)

ALTERATION OF WRITINGS—BURDEN OF PROOF.—The introduction in evidence of a note sued on containing apparent alterations, on proof merely of the maker's signature, though sufficient in the absence of rebutting evidence to make out plaintiff's case, does not shift the burden of proof to the defendant to explain such alteration. (p. 184.)

NEGOTIABLE INSTRUMENTS—ACCOMMODATION MAKERS.—Lack of authority of an officer of a corporation to execute a note in its name payable to himself, though a good defense as to the corporation, is no defense for accommodation makers, who, as officers of the corporation, and with notice of such lack of authority, sign the note to give it currency. (pp. 185, 186.)

NEGOTIABLE INSTRUMENTS—DIVERSION OF PROCEEDS.—ACCOMMODATION SURETIES who trust the maker with a note payable to his own order, upon which to raise money, trust him to make a proper application of the proceeds, and are not released if he diverts the fund thus obtained to a wrongful purpose, without notice, at the time, on the part of the person advancing the fund of his intention to wrongfully divert it. (p. 186.)

NEGOTIABLE INSTRUMENTS—DIVERSION OF PROCEEDS.—If an accommodation note of a corporation is made payable to its president, the fact that a bank advancing funds on the note places the amount to such president's credit does not show that the bank has notice of his intention to divert the proceeds to a wrongful purpose. (p. 187.)

Greaves & Martin, Wood & Henderson, and Rose, Hemmingway & Rose, for the appellants.

Ratcliffe & Fletcher, for the appellee.

¹⁴³ RIDDICK, J. This is an action on a promissory note by the German Bank of Little Rock against the Park Hotel Company of Hot Springs and certain other parties residing there, who had joined in executing the note, and several questions are presented by the appeal.

On the question as to whether three of the defendants had the right to take a change of venue over the objection of another defendant who refused to join in such application, we are of the opinion that they did not have such right. Our statute (Sandel and Hill's Digest, sec. 7382) directs that, upon a change of venue being ordered in a civil action, the papers in the case "shall be transmitted to the clerk of the court to which the venue is changed," thus showing that it was not intended that one defendant to a civil action should have the right to sever his case from the others, and take a change of venue, without removing the case as to all the defendants. There ¹⁴⁴ is no reason why the wishes of one defendant as to a change of venue should be given preference over others, and when defendants properly joined in an action against them differ as to the expediency of a change of venue, and some of them refuse to join in the application, it is not error for the court to overrule the application. The words in the statute "any party to a civil action" may obtain a change of venue (Sandel and Hill's Digest, sec. 7379) do not mean that any individual defendant may obtain such order; but these words refer to the defendants as a class, and include all on that side. To be entitled to the change of venue, they must all join in or favor the application, with the exception, perhaps, of mere nominal or formal defendants having no real interest in that side: *Wolcott v. Wolcott*, 32 Wis. 63; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Whitaker v. Reynolds*, 14 Bush, 616; *Peters v. Banta*, 120 Ind. 422, 22 N. E. 95.

The next contention is that the court erred in permitting the note to be read in evidence without first requiring the alterations apparent on its face to be explained. It is said that this threw the burden of proof upon the defendants. But we do not concur in this contention. The burden of proof is on the plaintiff to make out his case, and to do this he must, of course, show that the defendants executed the note sued on; but, when he shows that the signatures to the instrument are those of the defendants, he has the right to introduce the instrument in evidence, and, if there be no further evidence, he has made out a case sufficient to go to the jury. "The view best supported by reason, and the one to which the authorities seem tending, is that the mere fact of an interlineation or erasure appearing in an instrument does not per se raise any presumption either for or against the validity of the writing; and the question when, by whom, and with what intent an al-

teration was made is one of fact, to be submitted to the jury upon the whole evidence": 2 Am. & Eng. Ency. of Law, 2d ed., 274; Gist v. Gans, 30 Ark. 285; Simpson v. Davis, 119 Mass. 269, 20 Am. Rep. 324; Wilson v. Hayes, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467; Willett v. Shepard, 34 Mich. 106; Stayner v. Joyce, 120 Ind. 99, 22 N. E. 89.

This is in substance the rule already declared by this court: Gist v. Gans, 30 Ark. 285.

The introduction of the note, and proof of the signatures thereto, did not shift the burden of proof, or put it upon the defendants, though, in the absence of rebutting evidence, this might have been sufficient to make out plaintiff's case. But in some of the instructions given at the request of plaintiff it seems to be assumed that ¹⁴⁵ the burden was on the defendants to show that the alterations were made after the execution of the note, yet the same thing can be said of those given on the request of the defendants. The presiding judge did not tell the jury, and was not asked to tell them, directly upon whom the burden of proof rested, but stated that it was for them to determine from all the evidence, including the appearance of the note, whether or not the same was altered after its execution by defendants. It is not contended that the judge committed any error in giving instructions on this point, but if he did it was error invited by the defendants as well as the plaintiff, and of which they have no right to complain: Standard Life Ins. Co. v. Schmaltz, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; Elliott on Appellate Procedure and Trial Practice, sec. 626.

It is next said that Hogaboom had no authority to execute the note for the hotel company, and that, as it was made payable to his own order, this was notice to everyone of his want of authority. Quoting the language of Lord Denman, counsel say the note "bears its death wound on its face." It must be conceded that, as Hogaboom had no authority to execute notes for the hotel company, the bank was not in the position of an innocent purchaser. But the evidence, we think, clearly shows that it acted in good faith, and took the note relying on the statements of Hogaboom that he did have authority, and trusting also to the signatures of the other defendants to the note, two of whom were officers in the hotel company, one being secretary, and the other director. The hotel company, it is true, was not bound by the statements of Hogaboom, nor by the fact that the other defendants had signed the note; and the circuit

judge therefore properly directed a verdict in its favor, but this did not release the sureties. There was nothing in the character of this contract forbidden by law. The hotel company could have executed such a note, had it chosen to do so, and the mere fact that the party assuming to act for it had no authority does not release the sureties. These sureties had the same notice of the want of authority on the part of Hogaboom that the banks had. Indeed, their opportunities for knowing the extent of Hogaboom's authority were much superior to those of the bank. As before stated, one was secretary, another a director, of the hotel company, and all of them lived in the city where the company and its hotel were located. When they executed the note to Hogaboom, and made it payable in Little Rock, the purpose was to enable him to obtain money on it, and they must have known that any ¹⁴⁶ party to lending money on it had the right, as against them, to rely upon their signatures, and believe that the note was valid. The very object they had in view in signing the note was to give it currency, and when that purpose has been carried out, and the money obtained, they cannot escape liability by showing that what they in effect represented to be true was not true. Defendants say that they relied upon the statements of Hogaboom that he had authority to execute the note for the hotel company. If so, they can look to Hogaboom. But the bank relied not only on the statements of Hogaboom, but upon the signatures defendants placed on the note expressly to give it value, and it has the right to hold not only Hogaboom, but defendants, liable for money loaned on their faith and credit: *Maledon v. Leflore*, 62 Ark. 388, 35 S. W. 1102; 2 Daniel on Negotiable Instruments, sec. 1306a; 2 Randolph on Commercial Paper, sec. 915.

Again, it is said that the bank knew that the note was executed for the accommodation of the hotel company, and yet permitted Hogaboom to divert it from its proper purpose. But, though the bank knew that the money was wanted for the hotel company, the money was payable to Hogaboom individually. The note on its face shows that the intention of the makers was that the money should be paid to him. While the bank refused to loan the full amount of the note, it offered to loan ten thousand dollars for the benefit of the hotel company. Hogaboom, assuming to act for the company, accepted the offer, gave his own note for the amount, and transferred the note sued on as collateral security to the bank. As this note

was made payable to Hogaboom, and delivered to him to negotiate and raise money upon, we are of the opinion it was immaterial whether he obtained the money by a sale of the note or a deposit of the same as collateral. In either case there was no diversion of the note, for he obtained the money for the benefit of the hotel company, and accomplished the purpose for which the note was executed. The bank had no notice of his intention to divert the funds to a wrongful purpose, and was not responsible for such misappropriation. The defendants, having trusted Hogaboom with a note payable to his own order, upon which to raise money, must, as we said in a recent case, be held to have trusted him to make a proper application of the proceeds: *Evans v. Speer Hardware Co.*, 65 Ark. 213, 45 S. W. 370; *Duncan v. Gilbert*, 29 N. J. L. 521; *Jackson v. First Nat. Bank*, 42 N. J. L. 177; *Maitland v. Citizens' Bank*, 40 Md. 561, 17 Am. Rep. 620; *Proctor v. Whitcomb*, 137 Mass. 303.

¹⁴⁷ Nor is it a matter of any moment that, instead of paying Hogaboom money in hand, the bank, at his request, gave him credit for it on the books of the bank. This was, in effect, the same thing as a payment. He at that time owed the bank nothing. It was understood that the money was to be used at once, and it was drawn out, nine thousand of it on the same day, and the remainder two days afterward.

There are other points raised, but we deem it unnecessary to discuss them. The evidence as to the alteration of the note was conflicting, but it was sufficient to sustain the finding of the jury. The conduct of the defendants themselves seems rather inconsistent with their own contention on this point. Although they say that this note was executed to the Citizens' Bank, yet, when it was presented for payment by the German Bank, they expressed no surprise, and gave no intimation to the bank that it had been altered.

It was about a year and a half afterward, and a year after suit had been brought, and nearly a year after the filing of their original answer, before by an amendment thereto the defendants first notified plaintiff of their contention that the note had been altered. For this reason, it is not strange that the jury felt disinclined to credit their statements on that point. While it seems to us that the preponderance of evidence on this question of alteration was in favor of the defendant, still we are clearly of the opinion that, under the circumstances

in proof, it was a question for the jury, and their finding must stand.

This case has been well argued by able counsel, but the sum of it is that these defendants were induced by the president of a hotel company to become sureties on a note which he claimed to have power to execute for the company. The company, when sued on the note, successfully disputed his authority, and he proved to be insolvent, and they are now bound for the payment of the note. It may be a hardship, but, as between them and the bank, from whom the money was obtained on their note, it seems to us that the bank has the best of the argument.

On the whole case, we think that the judgment was right, and it is therefore affirmed.

Alteration of Writing.—If any suspicion is raised as to the genuineness of an altered instrument, the party producing and claiming under it is bound to remove the suspicion by accounting for the alteration: *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440. In *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 42 N. W. 467, it is held that the burden of proof is on the maker of an instrument to show that an alteration thereof was made after delivery; and in *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331, that the burden is on the holder of a negotiable instrument to show that an alteration therein was innocently made. Where there is any ground of suspicion, it is said in the monographic note to *Woodworth v. Bank of America*, 10 Am. Dec. 273, it is generally a question for the jury to determine whether the alteration was made before or after the execution. As to the general subject of the effect of the unauthorized alteration of writings, see monographic note to *Burgess v. Blake*, ante, p. 80-134.

Accommodation Paper.—The effect of a diversion of accommodation paper or its proceeds from the purpose for which it was drawn, is considered in the monographic note to *Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 748-751.

BELL v. STATE.

[69 Ark. 148, 61 S. W. 918.]

HOMICIDE—THREATS AS EVIDENCE.—Previous threats made by, as well as the character of, the deceased are admissible in evidence when they tend to explain or palliate the conduct of the person accused of killing such deceased, by showing who was the probable aggressor. (p. 189.)

X. O. Pindall and R. D. Campbell, for the appellant.

J. Davis, attorney general, and C. Jacobson, for the appellee.

¹⁴⁹ BUNN, C. J. This is an indictment for murder in the first degree, upon which the defendant was tried and convicted in the Watson district of the Desha circuit court, at its August term, 1900, and verdict pronounced accordingly, and defendant appeals.

The motion for new trial, which was overruled by the court, contains eleven assignments of error, but it is only necessary to consider such as pertain to the exclusion of threats against the defendant on the part of the deceased, and her conduct of deadly violence against him on one or more occasions a little time before the killing. The defendant and the deceased—husband and wife—had not been living together in harmony for some time, and at the time of the killing the deceased had left the defendant, and was living with her mother. On the morning of that day the defendant, as he states in his testimony, went to the mother in law's house, to have a talk with the deceased about their domestic affairs and for the purpose of reconciliation. When he reached the house, the deceased, the mother, and one Ben Davis were present. The latter two soon after left, leaving the deceased and the defendant alone, except for the presence of their nine months' old baby. When thus alone the rencounter between the two took place, resulting in the death of the wife at the hands of the husband. The defendant, in his testimony, says that without warning the deceased went out of the house, procured an ax, and returned through the only open door in the house, and began the assault on him with the ax, and that, having no way of escape, what he did was purely to save his own life. He was the only living witness to the killing, and the question is, Who was the aggressor? The defendant offered to prove previous threats by the deceased against his life and instances of deadly assaults by her upon him; but this testimony the court excluded, and he excepted.

In *Palmore v. State*, 29 Ark. 248, this court said: "Threats, as well as the character of the deceased [evidence of which last also was excluded in this case], are admissible when they tend to explain or palliate the conduct of the accused. They are circumstantial facts which are a part of the *res gestae* whenever they are sufficiently ¹⁵⁰ connected with the acts and conduct of the parties as to cast light on that darkest of all subjects, the motives of the human heart." The same rule is approved in *People v. Arnold*, 15 Cal. 476 (see *Holler v. State*, 37 Ind. 57, 10 Am. Rep. 74; *King v. State*, 55 Ark. 604,

19 S. W. 110; *Brown v. State*, 55 Ark. 593, 18 S. W. 1051); and in *People v. Alivtre*, 55 Cal. 263, the rule is maintained, even when the threats have not been communicated to the defendant before the killing. The rule appears to be that, to determine in such case who was the probable aggressor, any testimony, otherwise unobjectionable, is admissible; otherwise, it would be impossible to solve the question where, as in this case, no other testimony could be had.

This is all that is necessary to consider now. The judgment is reversed, and the cause remanded for new trial.

Battle, J., not participating.

Homicide.—Threats made by a decedent a short time before a fatal encounter are admissible in evidence on the trial of the latter for murder: *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145; *Hart v. Commonwealth*, 85 Ky. 77, 7 Am. St. Rep. 576, 2 S. W. 673. Compare *State v. Spencer*, 160 Mo. 118, 83 Am. St. Rep. 463, 60 S. W. 1048; *State v. Doherty*, 72 Vt. 381, 82 Am. St. Rep. 951, 48 Atl. 658.

ST. LOUIS SOUTHWESTERN RY. CO. v. HARPER.

[69 Ark. 186, 61 S. W. 911.]

CARRIERS—PASSENGERS, WHO ARE.—A person who enters a train which he should have known did not stop at the station of his destination, but which he hoped would stop there and to which he has a ticket, but who refuses to pay fare to the next stopping place is a passenger within the meaning of a statute providing that if a passenger shall refuse to pay his fare he may be put off the cars "at any usual stopping place," and he is entitled to damages for being ejected from the train at any other place. (p. 190.)

S. H. West and J. T. Sifford, for the appellant.

¹⁸⁷ RIDDICK, J. This is an action for damages alleged to have been caused the plaintiff by being ejected from one of defendant's passenger trains. Our statute provides that "if any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place the conductor shall select": *Sandel and Hill's Digest*, sec. 6192.

¹⁸⁸ Counsel for the defendant company contend that this statute does not apply here, for the reason that the plaintiff

knew, or by the exercise of ordinary care could have known, that the train which he entered did not stop at Milner, and that, as he refused to pay his fare to any station at which the train did stop, he was not a passenger. It is doubtless true that one who enters a railway train, and afterward wrongfully and persistently refuses to pay his fare, is not entitled to the high degree of care which the law exacts of railroads for the protection of passengers. Within the meaning of the rules requiring such care, it has been often held that such a person is not a passenger: *Condran v. Chicago etc. Ry. Co.*, 67 Fed. 522; 2 Wood on Railroads, Minor's ed., 1213; 5 Am. & Eng. Ency. of Law, 2d ed., 496, and cases cited.

We do not controvert the soundness of these decisions, but it is evident that the reasons upon which they are based do not apply here; for the object of this statute was to prevent railroad companies from ejecting a passenger for refusal to pay fare at other than a usual stopping place. If those refusing to pay fare are not passengers, within the meaning of this act, then the statute can have no application, and is meaningless. It is therefore very evident, we think, that the refusal to pay by one traveling on a train does not, within the meaning of this statute, show that he is not a passenger.

It may, of course, be doubted whether one who enters a train, intending not to pay his fare and to defraud the company, would be protected by this statute; but we need not determine that question, for the evidence here, we think, does not show such a state of facts. The plaintiff carelessly entered a train which he should have known did not stop at Milner, but he did so, hoping that it would stop either at Milner or at a water-tank near there, and thus afford him the opportunity to reach his destination. He had a ticket to Milner, which he gave to the conductor, but the ticket was returned, and the plaintiff ejected, because he refused to pay the additional fare to the first regular stopping place for that train. The company could have excluded him from the train, or ejected him at the place he entered, but, having carried him away from that point, was, under the statute, required to carry him to some other usual stopping place before ejecting him. The plaintiff may not have desired to go to Stephens, the next stopping place, but, as he had carelessly entered a train that was not required to stop before reaching that place, he could have been ¹⁸⁹ carried there whether he wished to go or not; for the company in such a case was not required to stop the train sooner for his own

convenience. As the place at which he was ejected was not a usual stopping place for trains, and as he was not given the option of being carried to Stephens, instead of being put off there, the ejection was unlawful.

The injury to plaintiff was small, but it was night, a slight rain was falling, and plaintiff was suffering some from fever. He was put off a mile or two from a station. Under these circumstances the sum for which the court gave judgment was not excessive.

Affirmed.

Passengers.—It is the duty of one about to take passage on a railroad train to inform himself when, where, and how he can go or stop according to the regulations of the company. But if he takes the wrong conveyance, it is the duty of the carrier to inform him and put him off at the proper place. The fact one takes a train which does not stop at the station where he desires to get off does not affect the measure of duty of the carrier, or the degree of protection to which he is entitled against the negligent acts of its servants: See the monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 83.

FORD v. HARRISON.

[69 Ark. 205, 62 S. W. 59.]

EJECTMENT—DEFENSES.—A person who purchases the same land from two different persons may, if sued in ejectment by a third person, rely on either or both of the titles he has purchased. (p. 192.)

JUDGMENTS—MERGER—MORTGAGE LIEN.—The lien of a mortgage is not merged in a judgment of foreclosure of the mortgage, so as to expire with the expiration of the judgment lien. (p. 193.)

H. Moore, for the appellant.

King & Searcy, for the appellee.

207 RIDDICK, J. This is an action of ejectment, where both parties claim title under R. B. Ford, who is admitted by both parties to have been the owner of the land. R. B. Ford mortgaged the land to Henry Moore, and afterward conveyed it to R. F. Ford. Mrs. Harrison, the plaintiff, claims title by virtue of an execution sale of the land as the property of R. F. Ford. The defendant, M. H. Ford, rests his title upon a

sale under a decree foreclosing the mortgage given by R. B. Ford to Moore. As R. B. Ford had mortgaged the land to Moore before he conveyed it to R. F. Ford, and as R. F. Ford was a party to the foreclosure decree obtained by Moore, it is evident that a sale under such decree would ordinarily cut off all interest of R. F. Ford in the land. It would cut off not only the interest of R. F. Ford, but also the interest of any purchaser or person by virtue of a sale under execution against him, when there was no attachment, and when the judgment upon which the execution was issued was recovered after the rendition of the foreclosure decree. But counsel for Mrs. Harrison contend that the sale under the decree did not have that effect in this case, for the reason, as they contend, that Moore abandoned his decree, and waived his lien, and that both he and M. H. Ford, his vendee, are now estopped from setting up such decree and sale. But we see nothing in the evidence to sustain such a contention. A man may purchase the same land from two different persons, and, if he is sued by a third person, he can rely on either or both of the titles he has purchased. The fact that M. H. Ford had purchased this land from his brother did not prevent him from purchasing it from Moore. Nor does the fact that he had recorded the deed from his brother estop him from setting up the title acquired from Moore. But counsel say that the foreclosure decree directed the commissioner to sell on the 14th of December, 1891, unless one hundred dollars were paid before that day, but directs that, if such payment was made, the commissioner ²⁰⁸ should postpone the sale for the remainder of the debt until December 14, 1892. The last-mentioned day having passed without a sale, they contend that the presumption is the decree had been satisfied by the payment of the debt. But under the facts of this case the contention that the decree should be treated as satisfied because the land was not sold on the day named in the decree is, we think, utterly untenable, and is only noticed on account of the somewhat strenuous argument made by counsel in support of it.

The next contention urged by counsel for plaintiff is that the title or lien given by the mortgage was merged in the foreclosure judgment rendered in 1891, and that the lien of this judgment, not having been revived, expired after three years, and that thereupon the judgment of plaintiff, filed in 1892, became a first lien on the land. But, while the note secured

by the mortgage and sued on—in other words, the cause of action—was merged in the judgment, so that plaintiff could not maintain another action on the note or mortgage, yet the mortgage lien or title was not merged in the judgment. On the contrary, the object of the suit was to establish that title. All conflicting liens or interests adverse to the mortgage possessed by the defendants in the foreclosure suit were cut off by the foreclosure decree, and the mortgage lien or title was by that decree established as superior and paramount. After such decree Moore still held his mortgage lien or title, but he held it freed from any defects or uncertainty as to the rights of the defendants, these having been determined by the decree. The debt secured by the mortgage was no longer a promissory note, liable to be barred by statute of limitations after five years, but a judgment, which would not be barred until ten years from its rendition. The statute requiring suits to foreclose mortgages to be brought within the period of limitation prescribed for a suit on the debt for the security of which the mortgage was given does not affect this case, for the mortgage has already been foreclosed, and the land sold under the decree in less than five years after it was rendered—long before the decree was barred by the statute, and while the lien of the mortgage was still in force. It results from what we have said that, in our opinion, the purchaser under the foreclosure sale obtained a title superior to that of the purchaser at the sale under execution against R. F. Ford, whose interest in the land was determined by the decree to be subject to the mortgage. Had plaintiff, after obtaining her judgment ²⁰⁹ lien, brought suit in equity to redeem from the mortgage and decree, and to subject the interest of R. F. Ford in the land to her judgment, different questions would have been presented. But this is a suit in ejectment, not an action to redeem or set aside for fraud, and the only question presented is, Which has the superior legal title, plaintiff or defendant? We are of the opinion that the title of the defendant is superior to that of plaintiff, and that the circuit court erred in its findings and judgment in favor of plaintiff.

The judgment is therefore reversed, and the cause remanded for a new trial.

In Ejectment, the defendant may avail himself of any legal defense: *Prentiss v. Brewer*, 17 Wis. 635, 86 Am. Dec. 730; and the plaintiff must recover on the strength of his own title, not on the weakness of his adversary's: *Illinois Steel Co. v. Bilot*, 109 Wis.

418, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402; Hammond v. Shepard, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867; Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592.

A Judgment Merges the cause of action on which it is based: Gray v. Richmond Bicycle Co., 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663; Bracken v. Atlantic Trust Co., 167 N. Y. 510, 82 Am. St. Rep. 731, 60 N. E. 772. It has been held, however, that the lien of a mortgage is not merged in a judgment of foreclosure: Evansville Gaslight Co. v. State, 73 Ind. 219, 38 Am. Rep. 129. See, in this connection, Loomis v. Clambey, 69 Minn. 469, 65 Am. St. Rep. 576, 72 N. W. 707; Price v. First Nat. Bank, 62 Kan. 735, 84 Am. St. Rep. 419, 64 Pac. 637.

PLANTERS' MUTUAL INSURANCE ASSOCIATION OF ARKANSAS v. DEWBERRY.

[69 Ark. 295, 62 S. W. 1047.]

INSURANCE—CHANGE OF INTEREST BY DEATH.—The death of the insured and the descent of the property insured to his wife and children do not work such a change in the title or possession of the property as to avoid the policy of insurance. (p. 195.)

INSURANCE—CHANGE OF POSSESSION—LEASE.—If the wife of the insured, after his death, leases the property without the insurer's consent and surrenders possession to the tenant, this is such change of possession as avoids the policy conditioned that it shall be void in case of change in possession or occupancy of the property without the consent of the insurer. (p. 195.)

Action by Clara A. Dewberry, administratrix of R. A. Dewberry, deceased, to recover on an insurance policy, issued to the latter in his lifetime, for a loss occurring after his death. Judgment for plaintiff. Defendant appealed.

J. W. House, for the appellant.

Quarles & Moore and McCulloch & McCulloch, for the appellee.

300 HUGHES, J. While there is a conflict in the decided cases upon the question involved in the first instruction—that is, that the title to the property was changed by the death of R. A. Dewberry after the execution of the policy and the descent of the property insured to his wife and children—we incline to the opinion that the more reasonable view is that the title to the property was not changed by the death of R. A. Dewberry and the succession of his wife and children to his rights therein, within the meaning of the policy. We think

this view amply supported by the decisions: *Richardson v. German Ins. Co.*, 89 Ky. 571, 13 S. W. 1; *Burbank v. Rockingham etc. Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300; *Forrest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

We are of the opinion that the court committed reversible error in refusing to give instructions 2 and 3 asked by the defendant, which were to the effect that renting the property to Woodford Haile for twelve months and its occupancy by him at the time of the loss constituted a change of possession under the policy. The house destroyed was occupied by Mrs. Clara A. Dewberry at and after the death of her husband, until she rented the property to Woodford Haile, and gave him possession thereof, and moved away from the premises, and thereafter, until the house was consumed by fire, it was in the possession of Woodford Haile, and occupied exclusively by himself and family, consisting of nine others. If this was not a change of possession and occupancy, it is difficult to determine what would be. The parties to ³⁰¹ the insurance policy made their contract, and stipulated that there should be no change in the possession or occupancy of the property without the consent of the insurance company. The change of possession and occupancy was made without the consent of the insurance company, and continued to the time the house was consumed by fire. This was a violation of an express provision of the terms of the policy, the contract between the company and R. A. Dewberry, the insured, and avoids the policy according to its stipulations.

“Where the policy provides that it shall be void if any change takes place in the interest, title, or possession of the subject of insurance, such provision has reference to change subsequent to the time of effecting the insurance. Leasing the property and surrendering possession to the lessee is a change in the possession. If the policy is conditioned to be void in case any change takes place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise, an assignment for the benefit of the creditor will avoid the policy”: 3 Joyce on Insurance, sec. 2238.

In *Wenzel v. Commercial Ins. Co.*, 67 Cal. 440, 7 Pac. 817, the court said: “Another point made by the appellant is that the condition of the policy in regard to a change in possession of the property was broken by the insured. In the ninth find-

ing it is found by the court as a fact in the case that on the seventeenth day of January, 1882, the plaintiff and others, without the consent of the defendant, leased the property insured, and surrendered the possession thereof to James Hoskins and his associates. This was a breach of condition in the policy which rendered the same void according to the express language thereof": *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 180, 85 Am. Dec. 452; *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 43 Am. St. Rep. 749, 39 N. E. 77.

For the error indicated the judgment is reversed, and the cause is remanded for a new trial.

Insurance.—The Death of the insured does not work such a change in the title to the insured property as to avoid a policy of fire insurance: *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139. See, too, *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 61 Am. St. Rep. 627, 48 N. E. 751.

Insurance—Lease of Property.—A condition in a policy of insurance that any change in the title or possession of the insured property shall avoid the policy is not violated by a lease of the property, when the application for insurance states that the property is to be occupied by a tenant and the insurer has knowledge that it is to be so occupied: *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 25 Am. St. Rep. 191, 27 Pac. 738.

CASTLEBERRY v. STATE.

[69 Ark. 346, 63 S. W. 670.]

CONSTITUTIONAL LAW—DISCRIMINATION AGAINST NEGROES.—If a negro accused of crime, without pleading to the indictment, files a motion to quash it on the ground that the grand jury was impaneled before the crime was alleged to have been committed, and that all negroes were excluded on account of their race and color, and offers witnesses to prove his allegations, the overruling of such motion, without hearing evidence as to the facts alleged, is a denial to the accused of the equal protection of the laws guaranteed to him by the constitution of the United States. (p. 199.)

S. A. Jones and J. H. Carmichael, for the appellant.

G. W. Murphy, attorney general, for the appellee.

247 HUGHES, J. The appellant was indicted for larceny, pleaded not guilty, was tried and convicted, and appealed to this court. When the cause was called for trial, the defendant filed a motion to quash the indictment. He offered to intro-

duce evidence to sustain the allegations in said motion, which the court declined to hear, and overruled the motion, to all of which the defendant excepted, and filed his motion for a new trial, which was overruled by the court, to which the defendant excepted.

The attorney general contends that the question made in the court below is not presented here, and that the appellant has nothing before the court, inasmuch as he failed in his motion for a new trial to make the court's refusal to hear testimony upon his motion one of his grounds for a new trial. But, as we understand, he did make the action of the court in overruling his motion to quash the indictment a ground for a new trial in his motion for a new trial, which was overruled, and to which he excepted. The refusal of the court to hear evidence on the motion to quash was in effect saying: "Grant that the facts exist as set up in your motion; the motion is bad, there is nothing in it." This was, in effect, treating the motion as bad upon demurrer, and sustaining the demurrer. Was the motion good, the facts set up in it being conceded for the argument?

The motion is as follows: "Comes Scipio A. Jones, attorney for the defendant, Fred Castleberry, and moves the court to quash the indictment against him herein for the following reasons, to wit: 1. Because the offense for which he stands charged in the ³⁴⁸ indictment, and as shown by the indictment herein against him, was committed, if committed at all, after the impaneling and swearing in of the grand jury that found said indictment, and he was therefore deprived of his right and opportunity to be present at the impaneling and swearing in of the grand jury herein, and had no opportunity to challenge, nor has he made any plea whatever to said indictment, and therefore he claims the right and opportunity of challenging the formation and impaneling of said grand jury at this time; 2. That he has not been arraigned, nor has he pleaded in any way to said indictment, and that said grand jury which found said indictment was composed exclusively of white persons, and that all persons of color or of African descent, and known as negroes, were excluded from said grand jury on account of their race and color; that one-third of the inhabitants, and one-fourth of the legal electors, of this county are persons of color, or of African descent, known as 'negroes,' and were excluded from serving on said grand jury by the commissioners of said county on account of their race and color, and for no other

reason; 3. That the jury commissioners of this [Pulaski] county have for a long period of time, to wit, sixteen [16] years, neglected and refused and excluded all colored persons, or persons of African descent, from serving on said juries solely on account of their race and color; that said exclusion, neglect, and refusal is a discrimination against this defendant, who is a negro, and is a denial to him of an equal protection of the laws, as guaranteed to him under the constitution of the United States; 4. That all the circuit judges for a great number of years have been white persons; that they have selected no persons of color or of African descent, known as negroes, to serve as jury commissioners in this county; that, although there are many persons of color, or of African descent, known as 'negroes,' in said Pulaski county qualified to serve as jury commissioners, they have been excluded on account of their race and color by said judges in the selection of jury commissioners; that said failure of said circuit judges to select any persons of color, or of African descent, known as 'negroes,' to serve as jury commissioners is a discrimination against this defendant, who is a person of color or African descent, known as a negro, and is a denial to him of equal protection of the laws under the constitution of the United States. All of which the defendant is now ready to verify." And the same was verified.

349 The defendant, Fred Castleberry, to sustain his motion to quash the indictments herein, subpoenaed witnesses, who were sworn, and were offered to prove the allegations set out in his motion to quash said indictment, but when said witnesses were called, and their testimony offered to sustain said allegation, the court declined and refused to hear the statement of said witnesses, or any evidence upon said motion, over the objection of the defendant. To which refusal of the court to hear such testimony the defendant at the time excepted, and asked that his exceptions be noted of record, which was accordingly done.

As we understand the decision in *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. Rep. 687, it is held (quoting from the syllabus): "A person of the African race was indicted in an inferior court of a state for a murder, committed since the impaneling of the grand jury, and, before pleading in bar, presented and read to the court a motion to quash, duly and distinctly alleging that all persons of the African race were excluded, because of their race or color, from the grand jury

which found the indictment, and, as was stated in his bill of exceptions allowed by the judge, offered to introduce witnesses to prove that allegation, but the court refused to hear any evidence upon the subject, and, without investigating whether the allegation was true or false, overruled the motion, and defendant excepted. After conviction and sentence, he appealed to the highest court of the state in which a decision in the case could be had. The court affirmed the judgment, upon the assumption that the defendant had introduced no evidence upon the motion to quash. Held, that this was plainly disproved by the statements in the bill of exceptions, and that the judgment of affirmance denied to the defendant a right duly set up and claimed by him under the constitution of the United States, and must therefore be reversed by this court on writ of error."

The court below erred in overruling the motion to quash without hearing the evidence. The appellant was entitled to introduce testimony to sustain the allegations in his motion: *Smith v. Mississippi*, 162 U. S. 596, 601, 16 Sup. Ct. Rep. 900.

For the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

Constitutional Law.—If it appears that the officer summoning or drawing a jury, grand or petit, has been influenced by considerations of race, and has excluded qualified persons solely because of their race or color, it has been held that "it would be the duty of the court before which such motion could alone be made in the first instance, on sufficient proof of the facts, to quash such illegally drawn or summoned panel, or any indictment found by such illegally constituted grand jury": See the monographic note to *State v. Goodwill*, 25 Am. St. Rep. 878.

COWLING v. HILL

[69 Ark. 850, 63 S. W. 800.]

FRAUDULENT CONVEYANCES — ESTOPPEL AGAINST WIFE.—If a wife for a great number of years permits her husband to retain title to her land without objection, knowing that his creditors are dealing with him under the belief that it belongs to him, she is estopped, as to them, to claim the land as hers, and a conveyance by her husband to her to prevent the seizure of the land by such creditors is fraudulent and void. (p. 201.)

JUDGMENT AGAINST INFANTS WHO HAVE had no guardian appointed to defend them is void. (p. 201.)

W. C. Rodgers, for the appellants.

Williams & Arnold and Rose, Hemingway & Rose, for the appellees.

³⁵¹ RIDDICK, J. This was an action brought by a judgment creditor to set aside and declare fraudulent and void certain conveyances made by the judgment debtor to his wife. The circuit judge found that the conveyances were fraudulent and void as to the rights of the plaintiffs, and adjudged that the lands conveyed were subject to the payment of plaintiff's judgment. Under the facts and circumstances in proof, we think the judgment was right. The husband can, of course, convey property to his wife in payment of a valid debt due from him to her, as he can to any other creditor. But the courts cannot shut their eyes to the fact that, under statutes allowing the husband and wife to contract with each other, outside creditors of either are placed at a great disadvantage, should the husband and wife be dishonest and attempt to defraud them. In determining whether conveyances made between husband and wife are made in good faith or made to defraud creditors, judges must, in order to arrive at the truth, necessarily keep in mind the close relationship existing between the parties and the motives that, when one of them becomes involved in debt, may induce them to try to shift the title of the property to the other, thus, in law, placing it beyond the reach of the creditors of such party, while he still receives from it many of the benefits that an owner receives from property.

Now, in this case the land, which belonged to the estate of the wife's father, was conveyed to the husband, was held by him and treated as his own for about twenty years, without objection on the part of his wife. The husband was a merchant, and, in making statements to commercial agencies, he included the land as a part of his assets. As the legal title to this land was in the husband, both he and his wife must have known that his creditors were dealing with him under the belief that it belonged to him. The ³⁵² circumstances in proof were such, we think, as to justify the finding of the chancellor that, after having permitted the husband to own and control it for such a time, she should not be allowed to set up a claim to it as against the creditors of the husband. A conveyance by him to her with a view to prevent its seizure by his creditors was fraudulent and void. The finding of the chancellor is sup-

ported by evidence, and as to the adult defendants must be affirmed. There were, however, two minor defendants, heirs of Mrs. Cowling, who had no guardian appointed to defend for them, and against whom, by oversight, perhaps, a decree was rendered. As to them the judgment must be reversed, but as to other defendants it is affirmed.

Estoppel Against Married Women.—Generally, if a wife permits her husband to use her money or property as his own for a considerable period of time, incurring obligations and obtaining credit upon the faith of others that the property belongs to him, she is estopped to set up her title against his creditors: See the monographic note to *Trimble v. State*, 57 Am. St. Rep. 175-177. If a married woman furnishes money to her husband to purchase property for her, instructing him to take a conveyance in her name, and he takes it to himself, which she permits to stand for several years, she is estopped to claim the property as against his creditors: *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 813, 51 N. E. 835.

READ v. MISSISSIPPI COUNTY.

[69 Ark. 365, 63 S. W. 807.]

CONSTITUTIONAL LAW—INTEREST ON JUDGMENTS.—A statute providing that no judgment rendered against any county on county warrants or other evidence of county indebtedness shall thereafter bear any interest is valid, and is not an *ex post facto* law, nor does it impair the obligation of any contract, nor deprive a judgment creditor obtaining judgment before its passage of his property without due process of law. (p. 203.)

CONSTITUTIONAL LAW—INTEREST ON JUDGMENTS.—A state may legislate to reduce the rate of interest upon judgments previously obtained in its courts. Such legislation does not deprive the judgment creditor of his property without due process of law. (p. 204.)

The facts were stated by the court as follows: "This was an application by the appellant to the county court of Mississippi county for the allowance against the county of the amount of a judgment against said county recovered by the plaintiff in the United States circuit court for the eastern district of Arkansas on the 15th of December, 1888, for eight thousand two hundred and twelve dollars and sixty-three cents, with interest thereon from the date of the rendition thereof until the date of allowance by the county court of Mississippi county, at the rate of six per cent per annum, amounting to twelve thousand

eight hundred and six dollars and sixty-eight cents, principal and interest; and that county scrip be issued to him thereon. The county court disallowed the application on the grounds: 1. That said county court is not authorized to issue county warrants in payment of said judgment, on account of there not being an appropriation out of which to pay said judgment; 2. That no interest is due on said judgment after March 21, 1893. From which judgment plaintiff took an appeal to the circuit court. The circuit court held that so much of the claim as is the principal of said judgment and interest thereon to the 21st of March, 1893, and the costs in the circuit court of the United States, is a valid claim against the defendant, and ought to have been allowed, and that so much of said claim as consists of interest from March 21, 1893, until now (date of judgment in circuit court) is not a valid claim against the defendant, and was by the county court properly disallowed; and proceeded to give judgment accordingly—that the county court should allow interest on said claim from the rendition of said judgment to March 21, 1893, and the costs in the United States district court in said cause and costs in this cause, and that warrants issue therefor as provided by law, etc., and that the order of the county court disallowing interest on said judgment from March 21, 1893, until now be, and the same is, in all things approved. The plaintiff brings up the cause by appeal.”

G. W. Thomason, for the appellant.

³⁶⁶ HUGHES, J. The court held in *Nevada County v. Hicks*, 50 Ark. 416, 8 S. W. 180, that “the allowance of ³⁶⁷ interest on a judgment against a county is not a contract by the county to pay interest, and does not violate section 1, article 16, of the constitution, which forbids counties to issue any interest bearing evidences of indebtedness.” That a judgment against a county bears interest, whether mentioned in the judgment or not, at the rate of six per cent per annum (Mansfield’s Digest, secs. 4740, 4741; Sandel & Hill’s Digest, secs. 5082, 5083), unless the judgment is rendered upon a contract for more than six per cent, when it will bear the rate of interest the contract bore (when it does not exceed ten per cent, the lawful conventional rate, of course). Interest allowed on a judgment, where not stipulated for in the contract sued upon, is not by virtue of a contract, but is by operation of law, and

in the nature of a penalty for delay in payment of the principal, after it becomes due.

By act approved the 21st of March, 1893, it is provided "that no judgment rendered or to be rendered against any county in the state, on county warrants, or other evidences of county indebtedness, shall bear any interest after the passage of this act": Sandel and Hill's Digest, secs. 5082, 5083. The appellant thinks this act violates section 17 of article 2 of the constitution, which provides that no ex post facto law, or law impairing the obligation of contracts, shall ever be passed, and the portion of section 8, article 2 of the constitution which provides that no persons "shall be deprived of life, liberty, or property without due process of law." These provisions are also contained in the constitution of the United States. In the case of *Morley v. Lake Shore etc. R. Co.*, 146 U. S. 162, 13 Sup. Ct. Rep. 54, is to be found a case in point. It is as follows: "The court of appeals of the state of New York having held that a judgment obtained before the passage of the act of the legislature of that state of June 20, 1879, reducing the rate of interest (Sess. Laws, 1879, c. 538), is not a contract or obligation excepted from its operation under the provisions of section 1, this court accepts that construction as binding here."

"The provision in section 10 of article 1 of the constitution of the United States that no state shall pass 'any law impairing the obligation of contracts' does not forbid a state from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in its courts; as the judgment creditor has no contract whatever in that respect with the judgment debtor, and as the former's right to receive, and the latter's obligation to pay, exists only as to such amount of interest as the state chooses ³⁶⁸ to prescribe as a penalty or liquidated damages for the nonpayment of the judgment."

"A state statute reducing the rate of interest upon all judgments within the courts of the state does not, when applied to one obtained previous to its passage, deprive the judgment creditor of his property without due process of law, in violation of the provisions of section 1 of the fourteenth amendment to the constitution of the United States." This decision is satisfactory to us, and fully answers the appellant's contentions.

The judgment of the Mississippi circuit court is in all things affirmed.

Interest on Judgments allowed by statute is not interest in the strict sense, but a fixed measure of damages for delay in payment. A judgment is not a contract of which the rate of interest fixed by statute at the time it is rendered is a part, and the rate of interest on a judgment may be changed or modified by statute: *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 75 Am. St. Rep. 935, 53 Pac. 291.

KANSAS CITY, PITTSBURG AND GULF RAILWAY COMPANY v. PARKER.

[69 Ark. 401, 63 S. W. 996.]

GARNISHMENT—SITUS OF DEBT.—A citizen of one state may garnish a foreign railroad company operating within that state for a debt due one of its employes for labor performed therein although he is a citizen of another state. (p. 205.)

GARNISHMENT.—SITUS OF DEBT for the purpose of garnishment is not only at the domicile of the debtor, but in any state in which the garnishee may be found, provided the law of that state permits the debtor to be garnished, and the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the state. (p. 205.)

Read & McDonough, for the appellant.

⁴⁰¹ WOOD, J. The appellee brought suit against one B. B. Gilham, obtained personal service, and recovered judgment against him. Gilham was a citizen of Missouri. Appellee also garnished the appellant for a debt due Gilham for work done for it in the state of Arkansas, and recovered judgment, from which this appeal is taken. The question is, Can appellee, a citizen of Arkansas, garnish a foreign railroad corporation operating a railroad in this state for a debt due one of its employes for labor performed in the state of Arkansas, the employe being a citizen of Missouri?

There is great contrariety of judicial opinion on the question of the situs of debt for the purpose of garnishment. Professor Minor, in his recent work on Conflict of Laws, after stating and reviewing the various theories held upon this subject, states the true theory to be that the situs of a debt, for purposes of garnishment, is not only at the domicile of the debtor, but in any state in which the garnishee may be found, provided the municipal law of that state permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his voluntary ⁴⁰² appearance or actual service of pro-

cess upon him within the state. We concur in this view. For a full discussion of the question, see Minor on Conflict of Laws, c. 10, p. 270; Waples on Debtor and Creditor, Situs of Debt, secs. 171, 174, 176, 177, and authorities cited and reviewed therein; 14 Am. & Eng. Ency. of Law, 801 et seq., and cases cited.

The court had jurisdiction of the person of the principal debtor, and also jurisdiction of the railroad company, which, under our statute (since it operates a railroad in the state, and is presumed to have complied with the law), is to all intents and purposes a domestic corporation: Sandel and Hill's Digest, secs. 6326, 6327. So, from any view point, the judgment is correct, and must be affirmed.

So ordered.

Garnishment.—The situs of debts for the purpose of garnishment is considered at length in the monographic note to *National Bank v. Furtick*, 69 Am. St. Rep. 113-127. A resident trustee is chargeable upon a debt payable to a nonresident in the state of his domicile: *Hawley v. Hurd*, 72 Vt. 122, 82 Am. St. Rep. 922, 47 Atl. 401. But if all the parties are nonresidents, none of them being in the state except the garnishee, who is served with summons while within the state temporarily on business, the garnishment process must be discharged: *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. BRAGG.

[69 Ark. 402, 64 S. W. 226.]

RAILROADS—DAMAGES—INCONVENIENCE TO PASSENGER.—A railroad company is liable in actual damages for the inconvenience caused a passenger by being put off the train in the inclosed part of the railroad track so that she is compelled to pass a cattle-guard at night in order to reach a public crossing where she wished to alight. (p. 207.)

DAMAGES FOR FRIGHT AND NERVOUS SHOCK.—A railroad company is not liable in damages for the consequences of fright and nervous shock to a passenger, unaccompanied by any immediate physical injury, sustained by the unintentional negligence of the company in putting such passenger off the train in the inclosed part of the railroad track, so as to compel her to pass a cattle-guard on a dark night in order to reach a public crossing where she wished to alight. (p. 207.)

DAMAGES CANNOT BE RECOVERED FOR MERE FRIGHT OR MENTAL SHOCK, or the consequences thereof, unaccompanied by any immediate personal or physical injury and caused by unintentional negligence. (p. 207.)

Dodge & Johnson, for the appellant.

Scott & Jones, for the appellee.

⁴⁰⁴ RIDDICK, J. This is an action against a railway company by a female passenger to recover damages for being put off at a place away from the station. It is evident, though, that she was put off near the station, and only a few yards from the public crossing where she wished to alight. But she was frightened, she says, by reason of the fact that it was dark, and that a cattle-guard separated her from the crossing. Now, it is doubtless true that the employes of the train were guilty of carelessness in putting off the appellee and her young children at night at a place where they would have to pass the cattle-guard before reaching the depot or public crossing. If she or her children had been injured in attempting to pass the cattle-guard, it would have been entirely just to have held the company responsible for the damages suffered. But no such injury followed. A neighbor saw them alight, and went to them at once, and assisted them to cross the cattle-guard, and to reach their destination in safety. Admitting that the defendant is liable for the inconvenience caused by putting the plaintiff off in the inclosed part of the railroad track, so that she was compelled to pass a cattle-guard at night, this by no means justifies the judgment for one thousand dollars rendered in her favor, unless the company is responsible for the consequences of the fright and nervous shock which she claims to have sustained, and which, according to the testimony of her father, a physician, resulted in excessive nervous prostration, and in permanent loss of health. Plaintiff, indeed, bases her right to recover in this case, not on any immediate physical injury suffered by reason of the negligence of the defendant, but upon fright and subsequent prostration and ill-health caused by the fright. But the right to recover for a physical injury resulting from fright or mental anguish ⁴⁰⁵ only would seem to depend on whether a recovery could be had for such fright and mental anguish.

We held in a recent case that damages could not be recovered at law for mental pain and anguish unaccompanied by physical injury and caused by unintentional negligence: *Peay v. Western Union Tel. Co.*, 64 Ark. 544, 43 S. W. 965. And in a case where the law allows no recovery for the mental anguish or fright, it would seem logically to follow that no recovery can

be had for the consequences or results of the fright, such consequences, as stated by the court of appeals of New York, going merely to show the degree of the fright and the extent of the damages: *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604, 45 N. E. 354; *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88.

But we need not go into a discussion of the reasons for such a rule, for, waiving the question as to whether it would apply to the facts of this case, we think that the claim of plaintiff to recover for the sickness and loss of health alleged to have been suffered by her must be denied upon other grounds. It is a fundamental rule of law that to recover damages on account of the unintentional negligence of another, it must appear that the injury was the natural and probable consequences thereof, and that it ought to have been foreseen in the light of the attending circumstances: *Scheffer v. Railroad Co.*, 105 U. S. 249.

Now, plaintiff was not ejected from the train. She alighted of her own volition, being assisted by the employés of the company. Through the unintentional carelessness of one of the employés of the company, she was assisted from the train, not at the crossing where she wished to alight, but a few yards away, at a place separated from the crossing by a fence and cattle-guard, thus compelling her to pass over the cattle-guard to get to the crossing. Plaintiff was not put off in a wilderness, but in a village where others could have been called to her aid, if needed. She was not a stranger in the village. Her father lived there, and her own home was only a few miles away, and she had been there often. She was, on this occasion, traveling to this village, and, as before stated, was put off only a few yards from the crossing where she desired to alight. She knew where the depot and the crossing were, and the only trouble was the cattle-guard between her and the crossing. But there were others at or near the depot when she alighted. One of them, who testified as her witness, said ⁴⁰⁶ that he was only thirty or forty feet from her when she alighted from the train; that he recognized her, and went to her immediately, so soon as he could pass the intervening fence and cattle-guard. Under these circumstances, we are unable to see any reason why the plaintiff should have been so much frightened. If any fright existed, it must certainly have been over in a minute or two, when assistance arrived. We therefore feel compelled to hold that the long train of physical ills of which she complains was not the natural or probable consequence of defendant's negligence.

No prudent man, knowing all the circumstances, could have foreseen such consequences; and the defendant, under the rule above stated, is not responsible for them.

It was, no doubt, inconvenient to have to cross the cattle-guard. Considering that it was at night, and that plaintiff was a woman, and had with her two young children, there was probably ground for the recovery of something more than nominal damages in this case, to cover the actual inconvenience and injury sustained. But, under the view we take of the law, the verdict is clearly excessive, and based on matters for which the defendant is not liable.

The judgment is therefore reversed and a new trial ordered.

Damages for Fright.—There can be no recovery for fright alone. But damages may be had for fright if there is contemporaneous physical injury: *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; monographic note to *Gulf etc. Ry. Co. v. Hayter*, 77 Am. St. Rep. 860. See this note, pages 865-867, for a discussion of these principles as applied to passengers put off a train at night at places more or less remote from the station.

CONLEY v. JOHNSON.

[69 Ark. 513, 64 S. W. 277.]

STATUTE OF FRAUDS—ESTOPPEL.—Although a written lease of land for more than one year cannot be altered or destroyed by any subsequent verbal agreement under the statute of frauds, yet such agreement operates as an estoppel against the landlord and his grantee taking with notice thereof, if such landlord by his conduct has induced the tenant to act upon such verbal agreement. (p. 211.)

The facts were stated by the court as follows: "This suit was to cancel the lease of a certain tract of land. The lease was to continue twenty-five years. The purpose, as set forth in the written contract of lease, was to have the lessee prospect and search for mineral and fossil substances, and to conduct mining and quarrying operations to any extent he might deem advisable, but he was not to hold possession of any part of the land for any other purpose. The lessee, his heirs and assigns, were to pay the lessor, his heirs and assigns, a royalty or rent of one-tenth part of all the ore to be extracted from the premises during the term of the lease. The lessee was to begin prospecting or mining within six months from the date of the

lease, and was to continue work thereon during the term of the lease. It was agreed 'that, if no mineral or fossil substances be mined or quarried within the period of five years from the date' of the lease, then the same was to be null and void. It was alleged in the complaint that the conditions of said lease had been broken, because there were no mineral or fossil substances mined or quarried upon the land within five years from the date of the lease, which was executed on the sixth day of November, 1883. The answer denied the alleged breach, and set up that the lessor and lessee entered into the following agreement as part of said original lease, to wit: 'State of Arkansas, county of Boone. This additional article of agreement, made and entered into on this fourth day of October, 1884, by and between John H. Patton, of the first part, and O. E. Hines, of the second part, witnesseth, that it is hereby agreed and understood that when the said party of the second part shall have struck and found mineral in paying quantities in three several places on said demised premises, and if such time is before there are adequate means of transportation for shipping the same to advantage, then and in that case it shall not be incumbent on the said party of the second part to further prosecute his mining and explorations of said premises for mineral until the proper transportation can be had for shipping the same to advantage, but so soon thereafter as transportation can be had as will justify the shipping of ores or metals in quantity, then the active and continuous work as specified in the original agreement to which this is annexed shall again be commenced and prosecuted.' And the answer further set up that within the time mentioned in the lease the lessor examined the work done on the land by the lessee, and agreed with him that the prospecting and mining done on the premises by said lessee showed mineral in paying quantities, and was a compliance with the terms of the lease, and that no further work under the lease and additional agreement would be required of the lessee, and that what he had done would be, and was, accepted as satisfactory under the lease; and the answer averred that appellees (the plaintiffs) had no greater rights than the lessor, to whose rights they succeeded, and were bound by the agreement between him and the lessee, and were estopped to assert anything to the contrary."

J. W. Story, for the appellants.

G. J. Crump, for the appellees.

⁵¹⁵ WOOD, J. We need not consider the question as to whether the additional written agreement, executed nearly a year subsequent to the lease, was based upon a consideration, and therefore to be considered and construed in connection with the lease. If it be conceded that the latter agreement controlled the clause of the lease requiring mineral or fossil substances to be mined or quarried within the period of five years from the date of the lease, still, under the terms of the latter agreement, there was to be suspension of work (or the requirements of the five-year clause), only, to use the language of the agreement, "when the party of the second part shall have struck and found mineral in paying quantities in three several places on said demised premises." It was purely a question of fact as to whether the mineral had been found in compliance with the terms of this latter agreement. We will not encumber the record by setting out and discussing in detail the evidence. In our opinion the preponderance of the evidence shows that the lessee had not "struck and found mineral in paying quantities in three several places on the demised premises." But it is contended that this provision of the latter agreement, as well as the five-year clause of the lease, was waived by the lessor in a subsequent verbal agreement, by which he accepted what had already been done as a compliance with the terms of both instruments.

While it is true that a lease or written contract concerning the leasing of lands for more than one year cannot be altered or destroyed by any subsequent verbal agreement under the statute of frauds (Sandel and Hill's Digest, sec. 3469), yet "it is a settled doctrine of equity"—as was said by Judge Cockrill in *Bazemore v. Mullins*, 52 Ark. 207, 12 S. W. 474—"never to lend its aid to one who invokes it for the purpose of perpetrating a fraud." The uncontroverted proof of Patton, the lessor, under whom appellees claim, is as ⁵¹⁶ follows: "I recollect he [Hines, the lessee] commenced immediately after the lease was made, and worked continuously on that fall, next spring, and until the next fall and winter, when we made this agreement—worked right on until we had an agreement by which he was permitted to quit work until a railroad was built so as to furnish transportation. I accepted the work which Mr. Hines had done as a compliance with the terms and the additional article of agreement filed herein, and relieved him from further work until there should be such transportation as was provided for in such lease and additional agreement. I was

satisfied from what I saw, and from what Mr. Hines told me, that mineral in paying quantities had been discovered. At the time I sold the land to Mr. Dennis I told him that I had given Mr. Hines what he called 'a lay off' until the transportation comes near enough to ship the mineral off. He said that was all right—that he and the old man would fix that all right. I mean by the 'old man,' Hines, and by 'lay off,' that he was not to do any more work until the transportation comes near enough to ship the ore out."

This proof furnishes the basis for the doctrine of estoppel in pais against the lessor and all claiming under him with notice of these facts. This court, in *Shields v. Smith*, 37 Ark. 47, quoted approvingly from *Union Mutual Ins. Co. v. Mowry*, 96 U. S. 544, as follows: "The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party, who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statement, or enforce his rights against his declared intention of abandonment": *Bigelow on Estoppel*, 557.

Mr. Bishop says: "Though the statute of frauds binds the equity the same as the law tribunals, it does not abrogate the prior equity jurisdiction over fraud." And, continuing, he says: "It is a palpable fraud for one man to entice another with promises to change his course of action and to his injury part with his effects or his services, then fall back on the statutes to avoid doing what he had led the other to expect": *Bishop on Contracts*, enlarged edition, sec. 1237. Under this proof, to permit appellees to cancel the lease on the ground alleged in the complaint would be to enable them to take advantage of conditions which were brought ⁵¹⁷ about by the conduct of the lessor, and which neither he nor they could avail themselves of without perpetrating a fraud upon the rights of the appellants.

The decree of the learned chancellor is therefore reversed and the cause is remanded, with directions to dismiss the complaint for want of equity.

Statute of Frauds—Estoppel.—An easement in land may be created by estoppel, notwithstanding the statute of frauds: *Mattes*

v. Frankel, 157 N. Y. 603, 68 Am. St. Rep. 804, 52 N. E. 585. So may the title to land be conveyed by estoppel: Cross v. Weare Commission Co., 153 Ill. 499, 46 Am. St. Rep. 902, 38 N. E. 1038. The conduct of a landlord may, by estoppel, take a lease out of the operation of the statute of frauds: See the monographic note to Wallace v. Scoggins, 17 Am. St. Rep. 755, 766. On parol leases in general, consult Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11; Laroussini v. Werlein, 52 La. Ann. 424, 78 Am. St. Rep. 350, 27 South. 89; extended note to Wallace v. Scoggins, 17 Am. St. Rep. 752-757.

GILL v. GILL.

[69 Ark. 596, 63 S. W. 112.]

HOMESTEADS—OCCUPANCY.—If the owner of a house, having moved a portion of his household goods into it, with intent to occupy it as his homestead, is taken sick and dies before the house is occupied, after which his wife completes the moving and takes up her residence in the house, it is "occupied as a residence" by the family, so as to entitle the wife and minor children to claim it as a homestead. (p. 213.)

HOMESTEADS—OCCUPANCY.—WHILE MERE INTENTION to occupy a residence as a homestead, unaccompanied by any acts of actual occupancy, is not alone equivalent to possession, yet it, taken in connection with other circumstances, such as the time taken up in moving into the house and fitting it for occupancy, may constitute such a constructive occupancy as to form a sufficient basis for a claim of homestead. (p. 214.)

Hill & Auten, for the appellant.

J. Coates, for the appellees.

597 WOOD, J. R. G. Gill, a resident of this state, and a married man, purchased a half lot in the city of Little Rock, valued at one thousand and fifty dollars, for a homestead. Gill and his wife packed up some of their household goods, preparatory to moving. He and she went over to the house where they expected to live, and fixed a lock on the door. He was taken sick, but he directed his wife to hire someone to assist her in moving. She did so, and cleaned up the new house. Then, with the hired help, whom Gill paid for the work, she packed up some household goods and kitchen furniture, such as bed, bedstead, carpets, cooking stove, cooking utensils, etc., and moved same into the new house. Before the moving was completed, Gill, who had taken to his sick bed at his mother's, died. After his death, his wife continued the moving into the new house, and she and the minor children were occupying the

same as the homestead at the time of the institution of this suit. Gill had no other lands.

The only question on this appeal is, Was the land in controversy "owned and occupied by Gill as a residence," in the sense contemplated by article 9, section 5 of the constitution, so as to entitle his wife and minor children to claim same as a homestead? "The chief reason," says Mr. Thompson, "why actual occupancy is insisted upon as a condition to the exemption of a homestead is that it may serve to notify the world that it is the place claimed by the owner as exempt": Thompson on Homesteads, sec. 245.

This court has held that occupancy is necessary; that a mere intention to occupy is not sufficient. The principle has been settled and announced in cases where the facts showed nothing more than a mere intention to occupy as a homestead, unaccompanied by any acts of actual occupancy: Tumlinson v. Swinney, 22 Ark. 400, 76 Am. Dec. 432; Johnston v. Turner, 29 Ark. 280; Williams v. Dorris, 31 Ark. 466; Hoback v. Hoback, 33 Ark. 399; Patrick v. Baxter, 42 Ark. 175. But here the bona fide intention to occupy is manifested by some of the usual constituents and concomitants of occupancy, such as repairing and cleaning the house, and moving in household goods and kitchen furniture.

In Iowa there is an unbroken line of decisions holding that occupancy, the use of the house by the family as a homestead, is an essential requirement to impress the property with the character of a homestead; that the "mere intention to occupy it, though subsequently carried out, is not sufficient": Charles v. Lamberson, 1 Iowa, 435, 63 Am. Dec. 457; Christy v. Dyer, 14 Iowa, 438, 81 Am. Dec. 493; Elston v. Robinson, ⁵⁹⁸ 23 Iowa, 208; Givans v. Dewey, 47 Iowa, 414; First Nat. Bank v. Hollingsworth, 78 Iowa, 575, 43 N. W. 536. This court, in announcing the same doctrine, quoted the identical language of some of the Iowa cases: Williams v. Dorris, 31 Ark. 470. In the case of Neal v. Coe, 35 Iowa, 407, the defendants used the house on the place claimed as a homestead for holding a portion of their furniture as early as March 15th. On April 1st the family came to the town where the house was situated, expecting to possess the house, but the repairs not being completed, they did not actually sleep and eat in the house until twelve weeks thereafter. The plaintiff, who was seeking to subject the premises to the payment of his debt, had knowledge of the above facts, and of the intention of the defendants to oc-

occupy the premises as a home as soon as they were made fit. The supreme court of Iowa, in holding that the homestead character had been impressed upon the premises under the above facts, said: "While the intention is not alone sufficient to impress the homestead character, yet it may be considered in connection with the circumstances. Some time usually intervenes after the purchase of property before it can be actually occupied. Even after the process of moving begins it frequently takes days before the furniture can be arranged, and the house placed in comfortable condition for actual occupancy. Under such circumstances great inconvenience might arise if the homestead character was made to depend upon the actual personal presence of the members of the family. Law is entitled to and can command respect only when it is reasonable, and adapted to the ordinary conduct of human affairs." So say we.

Affirmed.

Homestead—Occupancy.—The purchase of a home with the intention to occupy it as a homestead, followed by actual occupancy within a reasonable time, impresses it, ab initio, with the homestead character and inviolability: *Upton v. Coxen*, 60 Kan. 1, 72 Am. St. Rep. 341, 55 Pac. 284; *Shaw v. Kirby*, 93 Wis. 379, 57 Am. St. Rep. 927, 67 N. W. 700. Actual occupancy is necessary in Alabama, except in the case of filing a declaration of claim: *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110, 18 South. 210. See, too, *Tillotson v. Millard*, 7 Minn. 513, 82 Am. Dec. 112. The homestead character does not attach to property until it is actually occupied as a home. Mere intention to occupy, though subsequently carried out, is not sufficient: *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493.

RHODES v. DRIVER.

[69 Ark. 606, 65 S. W. 106.]

INJUNCTION TO PROTECT POSSESSION OF DE FACTO OFFICER.—A contestant for a public office, out of possession, may be enjoined from assuming to exercise the functions of such office during the pendency of the contest of his election and until its final determination, or until the contestee is ousted by due process of law. (p. 218.)

Rose & Coleman, for the appellant.

Norton & Prewitt, for the appellee.

608 BATTLE, J. This action was instituted by Charles S. Driver against J. W. Rhodes, in the chancery court of Missis-

Mississippi county, to enjoin and restrain the defendant from exercising the functions of the office of circuit clerk of that county. The plaintiff alleged in his complaint substantially as follows:

"The petitioner, C. S. Driver, was duly elected clerk of the circuit court of Mississippi county at the general election held on the third day of September, 1900; that he was duly commissioned, qualified, and is now acting as such clerk; that J. W. Rhodes contested his election before the county court of said county, and that court, on the 24th of October, 1900, rendered a judgment declaring that the said Rhodes was duly elected to said office, and that the petitioner was not elected; that petitioner appealed to the circuit court, and filed a supersedeas bond; that the circuit court found in favor of the petitioner, and Rhodes appealed to the supreme court, which latter court reversed the judgment of the circuit court, and remanded the cause for a new trial, and the case is still pending and undetermined in the circuit court; and that the petitioner is in possession of the records and paraphernalia, and is discharging the duties, of said office. That on the eighteenth day of July, 1901, the governor of the state of Arkansas issued to Rhodes his commission as circuit clerk of said county, and issued and caused to be published a proclamation revoking and annulling the commission theretofore issued to the petitioner; that Rhodes, after qualifying under said commission, demanded the possession of the office, which the petitioner refused to deliver; that he is occupying an office in the courthouse of said county, and is holding himself out to the public as circuit clerk; that he is receiving deeds and other ⁶⁰⁰ instruments of record, and is exercising the functions of a circuit clerk, to the irreparable loss and injury of the petitioner and the public, and that there is no adequate remedy at law. Prayer that Rhodes be restrained from acting as circuit clerk of Mississippi county, and from interfering with the exercise of the functions of said office by the petitioner until the final determination of the contest proceedings."

Rhodes demurred to the petition on two grounds: 1. Because it did not state facts sufficient to constitute a cause of action; 2. Because it did not state a cause of action within the jurisdiction of a court of chancery. The demurrer was overruled, the defendant refused to answer or plead further, and a final decree was rendered in accordance with the prayer of the bill. Rhodes appealed.

Was appellee entitled to the injunction? Section 24 of article 19 of the constitution of this state says: "The general assembly shall provide by law the mode of contesting elections in cases not specifically provided for in this constitution." In obedience to this section of the constitution, the legislature passed an act providing that the contest of the election of any supreme judge or commissioner of state lands shall be before the circuit court of Pulaski county; and that the contest of the election of any circuit judge, prosecuting attorney, chancellor, or judge of the county and probate court shall be before the circuit court of the county where the defendant or contestee resides, or the county where the contestant resides and the contestee may be found. The act further provides that all actions or proceedings for such contests shall be by complaint filed in the circuit court as in other actions at law, in which the contestant shall plainly and fully set forth the grounds upon which the contest is founded; and provides that, "if the contestant shall succeed in his action, he shall not only have a judgment of ouster, but for damages, not exceeding the salary and fees of the office during the time he was excluded therefrom, with costs of suit; provided, either party shall have the right of appeal, with or without supersedeas, as in other cases at law": Sandel and Hill's Digest, secs. 2693, 2695, 2696.

This act also provides that "when the election of any clerk of the circuit court, sheriff, coroner, county surveyor, county treasurer, county assessor, justice of the peace, constable, . . . shall be contested, it shall be before the county court, and the person contesting any such election shall give the opposite party notice ⁶¹⁰ in writing ten days before the term of the court at which such election shall be contested, specifying the grounds on which he intends to rely, and if any objections be made to the qualifications of voters, the names of such voters, with the objections, shall be stated in the notice, and the parties shall be allowed process for witnesses": Sandel and Hill's Digest, sec. 2697.

In the latter class of contests, the contests before the county court, the act says:

"Sec. 2699. If the court shall be of the opinion that the person proclaimed elected is not duly elected, and the person contesting is elected, an order shall be entered to that effect, and a copy thereof shall forthwith be transmitted to the gov-

ernor, who shall commission the person declared duly elected by such order.

"Sec. 2700. If the person proclaimed duly elected shall have been commissioned previous to making the order annulling his election, it shall be the duty of the governor to cause such person to be notified that his commission is revoked": Sandel and Hill's Digest.

In both classes of contests the courts derive their jurisdiction from the act, the constitution having expressly authorized the general assembly to provide by law the mode of contesting such elections, with the express limitation "that in all cases of contest for any county, township, or municipal office an appeal shall lie, at the instance of the party aggrieved, from any inferior board, council, or tribunal to the circuit court": Const., art. 19, sec. 24, and art. 7, sec. 52. In defining the jurisdiction of the two courts the act authorized the circuit court, in the event the contestant succeeded, to render a judgment of ouster, and for damages and costs, and in that event limited the county court to an order declaring the contestant elected, and, incidentally, to a judgment for costs. In the latter class, if the contestee refuses to yield possession of the office, the contestant is left to the remedy provided by the statutes for the possession of an office unlawfully held: Sandel and Hill's Digest, secs. 7364-7372.

In *State v. Johnson*, 17 Ark. 407, in which it appeared that the contestant of the election of Johnson for mayor, in a contest before a board of commissioners duly authorized by an ordinance of the city of Fort Smith to hear and determine such contests, was declared elected, the court held that a writ of quo warranto was the legal remedy for the possession of the office if the contestee held the same and refused to surrender it after the board ⁶¹¹ so decided. In that case the ordinance under which the election was contested, which this court held to be valid, in part provided:

"4. That upon the application of either party, seeking to contest such election, the said commissioners, or a majority of them, shall immediately set a day and place to hear such contest, . . . and shall, in every respect, constitute a corporation court, etc."

"6. If the election of mayor shall be contested, and the order of said commissioners shall be that the person so contesting is duly elected, it shall be the duty of the recorder to forward a certified copy of such order, so filed with him,

together with a certified copy of this ordinance, to the governor of the state of Arkansas, within three days after filing such order with him as aforesaid.

"7. The decision of said board of commissioners shall be conclusive, and the party so declared to be elected shall be entitled to such office, and upon being duly qualified, as prescribed by law, may enter upon the duties thereof."

The last two sections of the ordinance copied above and section 2699 of Sandel and Hill's Digest, under which appellant was declared elected circuit clerk, are substantially the same in legal effect. Neither authorizes the contestant, when declared elected, to forcibly eject the contestee, or the issuance of process upon the judgment thereunder to place him in possession.

Appellee is in possession of the office in controversy, is in possession of its records and paraphernalia, and is discharging the duties of the same. He holds under a claim that he was legally elected to fill the office. The contest of his election is still pending in the Mississippi circuit court. Can appellant be lawfully enjoined by a court of equity from interfering with the exercise of the functions of the office by appellee until the final determination of the contest of his election, or he is ousted by due process of law?

"No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum of determining the disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common-law remedy by proceedings in the nature of a quo warranto": 2 High on Injunctions, 3d ed., sec. 1312.

But, as said in High on Injunctions, "while . . . courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers de facto by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary,

by protecting such possession against the interference of such claimants. . . . Upon the other hand, the actual incumbents of an office may be protected, pending a contest as to their title, from interference with their possession, and with the exercise of their functions. . . . And the granting of an injunction in such case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established": 2 High on Injunctions, 3d ed., sec. 1315, and cases cited.

We think that appellee was entitled to the injunction.

Decree affirmed.

An Injunction does not lie to try title to a public office: *Arnold v. Henry*, 155 Mo. 48, 78 Am. St. Rep. 556, 55 S. W. 1089; *Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297. The title to an office cannot be tried in equity: *State v. Van Beek*, 87 Iowa, 569, 43 Am. St. Rep. 397, 54 N. W. 525. However, it has been decided that the remedy by injunction may be employed by the incumbent of an office to protect his possession against the interference of an adverse claimant until the latter shall establish his title at law: See the monographic note to *Fletcher v. Tuttle*, 42 Am. St. Rep. 237.

ELDER v. STATE.

[69 Ark. 648, 65 S. W. 938.]

EVIDENCE—RES GESTAE.—DECLARATIONS which emanate directly from the act under investigation and explain and illustrate it are admissible as part of the *res gestae*, but mere narrations of a past event, or the declarations of a witness concerning such past event, giving his relations to it and his knowledge or opinion of it, made after the event is complete, and having no immediate connection with it, are not admissible as evidence to prove such event. (p. 223.)

EVIDENCE—RES GESTAE.—DECLARATIONS WHICH ARE THE RESULT OF AN AFTERTHOUGHT on the part of the declarant, made concerning a past event, are only hearsay and not competent evidence to prove the facts of such event. (p. 223.)

EVIDENCE IMPROPERLY ADMITTED must be treated as prejudicial unless there is something to show that it is not. (p. 224.)

HOMICIDE—SELF-DEFENSE.—It is only in cases of absolute necessity to prevent death or great bodily harm, or in cases where, though the danger may not be real, there is yet an honest belief on the part of the person defending himself that it is real, and when the circumstances may reasonably cause such belief on his part, and when he acts with due caution and circumspection and without negligence, that the law justifies or excuses one for taking the life of another. (p. 225.)

HOMICIDE—SELF-DEFENSE.—To justify the taking of human life in self-defense, the slayer must not only act in good faith under the belief that the danger is imminent, but there must be reasonable grounds for such belief on his part, and if, through carelessness or fright, or undue excitement, he takes the life of another, when it is not necessary, and when there is no reasonable ground to believe that it is necessary, he is not excused. The causes referred to may go in mitigation of the offense and may reduce the grade from murder to manslaughter, but furnish no complete justification or excuse for the taking of the life. (p. 225.)

TRIAL—ARGUMENT OF COUNSEL—REVIEW ON APPEAL.—Appellate courts do not reverse judgments for mere misstatements of law or fact on the part of counsel, but the trial court should not permit incorrect or misleading statements of law to be made by counsel, and where timely objection is made to such statements, and the court refuses to interfere, the party excepting to such ruling may have it reviewed on appeal. (p. 228.)

HOMICIDE—SELF-DEFENSE.—A person while in his own dwelling-house is not required to retreat from one assaulting him there, without regard to the nature of the assault or the intent of the assailant, and while the fact that he is thus in his own house does not justify him in using more force than is necessary, or in killing his assailant to prevent a mere assault, yet if the assault is "fierce and violent" he has the right to repel force by force, and to use such means as are reasonably necessary to protect himself from harm, even to the extent of taking life, if necessary to do so to preserve his own life or to prevent great bodily harm. (p. 228.)

F. A. Bolton and J. T. Young, for the appellant.

G. W. Murphy, attorney general, for the appellee.

650 **RIDDICK, J.** The defendant, W. L. Elder, was indicted for murder of one John Gullett, alleged to have been committed on the sixth day of April, 1899, in Faulkner county. He was tried and convicted of murder in the second degree and sentenced to be imprisoned for the term of five years, from which judgment he appealed.

The facts, briefly stated, are as follows: Elder was the owner of a house boat, on which he and his wife lived, and where he kept a small stock of merchandise. This boat was moored to the bank of the Arkansas river in Faulkner county. People from the opposite side of the river sometimes crossed over to trade at the boat, and it was the custom of Elder to carry such persons across in his skiff free of charge in order to induce them to trade with him. John Gullett, the person killed, lived with his wife in a tent on the bank of the river not far from the place where Elder's boat was moored. He was the owner of a skiff ferry on the river, and made his living by conveying people across the river. Elder's custom

of transferring people across the river to and from his boat free of charge interfered to some extent with Gullett's ferry business. He objected to it, and became angry with Elder on that account, and some of the witnesses say that he made threats against him. But the two men were related by marriage, Elder, though an older man than Gullett, having married his daughter; and from their general conduct toward each other it seems doubtful whether these threats, if made, were intended to be taken seriously. However, Gullett was at times addicted to strong drink, and on the day of the tragedy he spent most of ⁶⁵¹ the afternoon in Elder's house boat, being more or less in an intoxicated condition. As he did not go home for supper, his wife came after him. She found him drinking coffee and eating cakes, which Elder had given him. To her request that he go home with her, he replied that he would go when he got ready; that he was going to settle that matter before he went home. Elder at this time was standing behind the counter, where he had been for some time, staying there, as he said, to avoid a difficulty with Gullett, who seemed angry with him. Gullett, after he had finished his coffee, walked up to the counter behind which Elder was standing, threw his arms around Elder's neck, pulled his head down to the counter, and called him "a damned old gray-headed son of a bitch." Thereupon Bradley, a young man, the son of Elder's first wife by a former husband, and a member of Elder's family, caught hold of Gullett, and told him he must have peace. Elder got away, and Gullett then caught hold of Bradley. They struggled with each other awhile, and Gullett's wife came up, and asked him to go home with her, and have no fuss. Bradley also said to Gullett that he was his friend, and was for peace. During this struggle between Gullett and Bradley, the stepson of Elder, Elder came from behind the counter with a pistol in his hand, pushed Gullett and Bradley apart, and said: "This thing must be stopped." Gullett then let Bradley go, and turned toward Elder and advanced upon him. Elder, while Gullett was advancing upon him, and only a few feet away, fired two shots with his pistol. The first shot struck the ceiling of the room; the second struck Gullett, the last shot being fired when Gullett was only a few feet away. Gullett turned and staggered from the boat, and, in attempting to reach the bank, fell into the river. He called for his wife, and she went to him and helped him from the river.

Elder and Bradley also went to him, Elder saying as he reached him, "My God! This is like shooting a brother. I never hated to do anything so bad in my life." They assisted Gullett back into the boat, where he died in a few minutes.

There is no material difference in the testimony of the several witnesses as to the facts above stated, but there was a difference in their testimony as to whether Gullett at the time he was shot was attempting to cut Elder with a knife, or whether the first shot was fired at Gullett or not. Mrs. Gullett stated that the first shot which struck the roof of the boat appeared to have been fired at Gullett's head, and she and other witnesses for the state testified ⁶⁵² that they saw no knife in Gullett's hand; while the defendant and Bradley testified that the first shot was fired above Gullett into the roof of the boat, the defendant saying that he did so purposely to let Gullett know that he had a pistol, and to make him stop, and thus avoid the necessity of shooting him. Both of these witnesses stated that Gullett had a knife in his hand, and was close to Elder, and was cutting at him at the time the last shot was fired, and that his last stroke cut Elder's coat.

After Mrs. Gullett had given her account of the circumstances of the tragedy, she was asked by the attorney for the state to repeat to the jury a statement that Bradley had made after the killing took place. The defendant objected to the proof of this statement as evidence against Elder, but the court overruled the objection, and the witness answered: "After the shooting was over, and after Elder had left, and some time after Gullett had died, Bud Bradley said: 'Well, it is all over now, and there is no one to tell the tale but me, and I will be God damned if I know anything to tell.'"

It was shown that this statement was made about one hour after the killing, and the defendant contends that its admission was prejudicial error. The presiding judge allowed it to be proved as a part of the *res gestae*, but we feel convinced that this position cannot be sustained. It is, no doubt, difficult to lay down a rule by which it may be clearly determined in all cases what declarations may be properly received as a part of the *res gestae*. Declarations which emanate directly from the act under investigation, and which explain and illustrate it, are admissible. But mere narrations of a past event, or the declarations of a witness concerning such past event, giving his relations to it and his knowledge or opinion

of it, made after the event is complete, and having no immediate connection with it, are not admissible as evidence to prove such event. "Res gestae," says Mr. Wharton, "are the act talking for itself, not what people say when talking about the act, in other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself": 1 Wharton on Evidence, sec. 259. And, we may add, it would be the same whether the intention of the witness in making the declaration was to benefit himself or another. In either case, if the declaration was the result of an afterthought on the part of the declarant, made concerning a past event, it would be only hearsay, and not competent evidence to prove the facts of such event.

653 The declaration of Bradley, proved in this case, was, no doubt, made because of his friendship for Elder and his solicitude for his welfare. Yet it emanated not from the killing and the excitement thereof, but from ideas and thoughts that had passed through the speaker's mind after the tragedy was complete. He was, no doubt, at the time of this declaration disquieted by thoughts of the effect of this act upon Elder and others; but the killing itself was completely past, and the fact that the declaration manifested anxiety on the part of Bradley in behalf of Elder did not make it a part of the res gestae or competent evidence against Elder, who was not present when it was made, and in no way responsible for it. It is very true that under some circumstances this declaration might have been proved to show the state of feeling existing between the witness Bradley and Elder and to impeach the witness Bradley. In order to introduce this statement as impeaching testimony, the attention of the witness should have been called to it, and opportunity allowed him to explain it. But this statement of Bradley's was proved before he testified, and he was never asked about it while on the stand. It was not introduced as impeaching testimony, but as evidence of the guilt of the defendant, and for this purpose it was clearly incompetent.

There may be more reason for doubt as to whether this evidence was prejudicial or not. But the rule is that evidence improperly admitted must be treated as prejudicial unless there be something to show that it was not. The fact that the attorneys for the state insisted that this declaration

should be admitted over the objections of defendant goes to show that both parties considered that it would tend in some degree to sustain the charge against the defendant. That it might have had this effect appears also from a consideration of the other evidence, for there is very little in the facts proved, except the shooting itself, to show malice on the part of the defendant. But this declaration of Bradley may have tended to impress the idea upon the jury that there was some plot or conspiracy between Bradley and the defendant, aimed at Gullett, and which resulted in his death, and may have to some extent injured Elder in the estimation of the jury. For this reason we think it should have been excluded, and are of the opinion that its admission as evidence against Elder was prejudicial error.

654 The defendant objected to the seventh and eighth instructions given by the court to the jury, but the motion for new trial referred only to the seventh, which is as follows: "You are further instructed that, in passing on the question as to whether the defendant was acting in his necessary self-defense, you are to consider his condition and surroundings at the time, and determine whether the circumstances and surroundings were such as to induce in his mind an honest belief that he was in great danger of losing his own life or of receiving great bodily injury at the hands of the deceased; and if you believe from the evidence that such was the case, and that defendant fired the fatal shot while acting under such belief, and that he acted with due caution and circumspection, and without negligence, then it will be your duty to acquit the defendant." The main objection to this instruction urged by the defendant is that it made his acquittal depend upon the question of whether he acted "with due caution and circumspection and without negligence." But the instruction, as an abstract statement of law, can hardly be disputed. It is only in cases of absolute necessity, to prevent death or great bodily harm, or in cases where, though the danger may not be real; there is yet an honest belief on the part of the person defending himself that it is real, and when the circumstances may reasonably cause such belief on his part, that the law justifies or excuses one for taking the life of another. To justify the taking of life in self-defense, the slayer must not only act in good faith under the belief that the danger is imminent, but there must be reasonable grounds for such belief on his part. If, through carelessness

or fright, or undue excitement, he takes the life of another, when it was not necessary, and when there were no reasonable grounds to believe that it was necessary, he is not excused. In such cases, if the killing be done under fright or excitement, or through failure to exercise due caution, this may go in mitigation of the offense. It may reduce the grade of the offense from murder to manslaughter, but it furnishes no complete justification or excuse for the taking of life. As we understand the instruction, this was the meaning intended to be conveyed by it; but, as the shooting in this case was not accidental, and as one of the attorneys prosecuting for the state seems to have been misled by the statement in the instruction that the defendant must have acted with due caution and without negligence, it may have been better to have omitted such statement, and to have simply stated to the jury that if Gullett, at the time of the ⁶⁵⁵ shooting, was making, or attempting to make, an assault upon the defendant with a knife under such circumstances as made it reasonable for defendant to believe that he was in immediate danger of losing his life, or receiving great bodily injury at the hands of Gullett, and if defendant did honestly so believe, and if he fired the fatal shot while acting in good faith under such belief, in order to protect himself, then, under the law, he is excused, and the jury should acquit.

This, in substance, is what the instruction means, though there may be some unnecessary repetition in the language used, but the special counsel employed to prosecute for the state seems to have misunderstood it, and based upon it an argument to the jury which seems to us improper and misleading. He, so the bill of exception states, read this instruction to the jury, and asserted that, under the instruction, the defendant was guilty of gross negligence in coming from behind his counter, and that, but for this, it would not have been necessary to kill Gullett, and that by such negligence defendant forfeited his right of self-defense. In other words, because the instruction stated that the defendant, in making his defense to the assault, must have acted with due caution and without negligence, the attorney for the state asserted that the defendant was guilty of such negligence because he came from behind his counter to stop a quarrel in his own house, and therefore forfeited his right of self-defense. But we do not think the instruction justified such an argument. The negligence referred to in the instruction is

negligence on the part of the defendant in making his self-defense—not some prior negligence on the part of the defendant. In cases of this kind it is often said that, in order to justify the taking of life in self-defense, the person assaulted must be himself without fault; but the fault spoken of which it is said the defendant must be without is fault in commencing or carrying on the assault or difficulty, not mere negligence or careless conduct but for which he might have avoided the difficulty. For instance, if a person has notice that a certain man of a violent and dangerous character is angry with him and threatens to kill him, it might be his duty to avoid him as far as possible, so as to avert the necessity of defending himself against a probable assault. But if, in pursuing his lawful vocation, he should through forgetfulness travel a public highway leading near the man's house, when he could have as conveniently gone another way, and thus meets the man he wishes to avoid, and is ⁶⁵⁶ assaulted by him, the law does not, on account of such forgetfulness or carelessness, take away or lessen his right of self-defense. The fact that, after hearing of the man's anger and threats, he went near his house might be a circumstance tending more or less to show that the hostile meeting was purposely sought by him, and if that were true he could not justify the killing on the ground of self-defense, unless "he had really and in good faith endeavored to retreat or decline the contest." But if the meeting was not sought or desired by him, and only brought about by such unintentional carelessness or forgetfulness on his part, he would not be at fault in a criminal sense, and would have the same right of self-defense as one would have who was guilty of no carelessness of any kind.

Now, in this case Elder was in his own house, and he says that he went from behind his counter to stop the struggle between Gullett and Bradley—in other words, that he did it to preserve order in his house. He had a right to preserve order and quiet there, and if he went from behind his counter for that or any other lawful purpose, he was guilty of no negligence that the law would treat as criminal. On the other hand, having invited or permitted Gullett to enter his house, he had no right to kill him in order to keep him quiet; and, if he went behind the counter intending to kill him, or if he fired the fatal shot when Gullett was unarmed and attempting to assault him with his hands only, and when there was no reasonable grounds for Elder to believe that he was in

immediate danger of losing his life or receiving great bodily harm, then he was not justified in such act, and is guilty of either murder or manslaughter, according to the circumstances and the amount of provocation and excitement under which the act was done. In neither view of the case do we see any ground for holding Elder criminally responsible for mere carelessness in coming from behind his counter, and we think the argument of counsel to the jury on that point was improper and misleading.

It is a matter of course that appellate courts do not reverse judgments for mere misstatements of law or fact on the part of counsel. Counsel often make their arguments offhand, and are liable to commit errors of that kind which are not subject to review on appeal, for appellate courts sit to review errors of courts, not those of counsel. But the trial court should not permit incorrect and misleading statements of law to be made by counsel to the jury, and where timely objection is made to such statements of ⁶⁵⁷ counsel, and the trial judge refuses to interfere, the party excepting to such ruling can have it reviewed on appeal. In this case an objection was made to the argument at the time, the presiding judge refused to interfere, and to this ruling the defendant excepted. The refusal of the judge to check counsel was in effect an indorsement of his statements, and we must therefore hold that the court erred in permitting counsel for the state to assert to the jury that, under the instruction given, if Elder negligently went from behind his counter, he forfeited his right of self-defense; for the assertion of counsel that the instruction carried that meaning was, we think, misleading and prejudicial to the defendant.

The eighth instruction asked by the defendant told the jury, in substance, that if the deceased brought on the difficulty, and the assault made by him was so fierce and violent as to make the defendant believe he was in danger of losing his life or suffering great bodily harm, then defendant was not bound to retreat, but had the right to act in his defense until the danger was over. The presiding judge modified this instruction by substituting for the words "so fierce and violent" in the instruction the words "with such murderous intent." The instruction, as asked, is not, abstractly considered, a correct statement of the law, for the fact that an assault is sudden and violent does not of itself excuse the one assaulted from endeavoring to retreat if he can safely do so to avoid

the necessity of taking life. An assault of that kind may, of course, tend, more or less, to show that no opportunity for retreat was afforded, especially when made with a deadly weapon. But we need not discuss that question, for, under the admitted facts of this case, the defendant was in his own dwelling-house, and therefore not required to retreat from one assaulting him there, without regard to the nature of the assault or the intent of the assailant. While the fact that he was in his own house did not justify him in using more force than was necessary, or in killing Gullett to prevent a mere assault with the hand or fist, yet he had the right to repel force by force, and to use such means as were reasonably necessary to protect himself from harm, even to the extent of taking life, if necessary to do so to preserve his own life or to prevent great bodily harm.

For these reasons, we think the instruction, as modified, was calculated to mislead the jury. The main question in this case, as we see the evidence, was whether the defendant used more force than was necessary in repelling the assault of Gullett. Being in ⁶⁵⁸ his dwelling-house, as we have stated, he was not required to retreat, and had the right to resist force by force, but he had no right to take the life of one attempting to assault him with the hand only. If Gullett at the time he was shot had no knife in his hand, and if defendant had no reasonable grounds to believe he was about to be assaulted with a deadly weapon, he was not justified in shooting Gullett as he did. On the other hand, if Gullett was attempting to assault the defendant with a knife, and the circumstances were such as to reasonably cause the defendant to believe that he was in imminent danger of losing his life, or of receiving great bodily harm, and he did so believe, then he was justified in using the force necessary to protect himself, and, if necessary to this end, he could take the life of his assailant.

Most of these questions were properly presented to the jury, but for the errors noted we are of the opinion that the judgment should be reversed, and a new trial granted.

It is so ordered.

Res Gestae are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character: *Pinney v. Jones*, 64 Conn. 545, 42 Am. St. Rep. 209, 80 Atl. 762; *Hermes v. Chicago etc. Ry. Co.*, 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584. To make declarations a

part of the *res gestae*, they must be contemporaneous with the main fact, but they need not be precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous: *State v. Arnold*, 47 S. C. 9, 58 Am. St. Rep. 867, 24 S. E. 926; *Castillo v. State*, 31 Tex. Cr. Rep. 145, 37 Am. St. Rep. 794, 19 S. W. 892; *Lewis v. State*, 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642. For illustrations of *res gestae*, see *Jones v. Chenault*, 124 Ala. 610, 82 Am. St. Rep. 211, 27 South. 515; *Brown v. State*, 78 Miss. 637, 84 Am. St. Rep. 641, 29 South. 519; *Purcell v. Chicago etc. Ry. Co.*, 109 Iowa, 629, 77 Am. St. Rep. 557, 80 N. W. 682; *Griffin v. State*, 40 Tex. Cr. Rep. 312, 76 Am. St. Rep. 718, 50 S. W. 366; monographic note to *People v. Vernon*, 95 Am. Dec. 51-76.

Self-defense.—In order to justify the killing of a human being on the ground of self-defense, it must appear that the accused acted under a reasonable belief that he was in imminent danger of death or of great bodily harm from the deceased. Still, the danger need be only apparent. The question is, Did the accused honestly believe that he was in danger of his life or great bodily harm, and that it was necessary for him to do what he did to save himself from such apparent or threatened danger: See the monographic note to *State v. Sumner*, 74 Am. St. Rep. 717, 719, 723; *State v. Doherty*, 72 Vt. 381, 82 Am. St. Rep. 951, 48 Atl. 658. A person has a right to defend his habitation from assault, but it is only when such attack threatens the commission of a felony or great bodily harm to one of the inmates that life may be taken in defending it: See the monographic note to *State v. Sumner*, 74 Am. St. Rep. 740.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

**ONTARIO DECIDUOUS FRUIT GROWERS' ASSOCIA-
TION v. CUTTING FRUIT PACKING COMPANY.**

[134 Cal. 21, 66 Pac. 28.]

SALE—RECOVERY FOR PARTIAL DELIVERY.—If a contract of sale is entered into, and the seller delivers a part only of the goods contracted for, the vendee, by accepting and retaining such part, waives the condition precedent of the delivery of the balance, and the vendor may recover for the goods delivered and retained. (p. 233.)

SALE—IMPOSSIBILITY OF PERFORMANCE OF CONTRACT OF.—If a contract is for the sale of specified varieties of fruit growing and to be grown in designated orchards, which are afterward so affected by drought that they do not produce sufficient to comply with the contract, the vendor can be compelled to perform so far only as it is possible for him to do so, nor is he answerable for the failure to comply with the contract, not attributable to any fault on his part. (p. 234.)

SALE—COMPELLING SUBSTITUTION OF OTHER ARTICLES.—If a vendor, through no fault of his, is unable to deliver fruit of a specified variety, he cannot be compelled to supply another. This would be substituting a new sale, rather than complying with the original contract. (p. 234.)

EVIDENCE—PAROL. TO IDENTIFY THE SUBJECT OF CONTRACT.—If a written contract provides for the sale of all peaches in "sundry orchards in Ontario and Cucamonga," parol evidence is admissible to identify the orchards contemplated by the parties to the contract. (p. 234.)

APPELLATE PRACTICE—IMMATERIAL ERROR.—The reception of oral evidence of an agreement between the parties at the time of executing a written contract limiting its effect is not prejudicial error, if the matter testified to relates only to conditions fairly implied from the written contract. (p. 234.)

Warren Olney and Curtis & Curtis, for the appellant.

E. R. Annable, for the respondent.

²² GRAY, C. This action was brought to recover the price of certain peaches sold and delivered under a contract in writing. The defendant set up as a defense noncompliance of plaintiff with the contract, and also a counterclaim on account of damages arising out of such noncompliance. The plaintiff had judgment, from which and from an order denying a new trial the defendant appeals.

The contract between the parties contains the following stipulations: "Seller has this day sold and agrees to deliver to buyer, f. o. b. cars at South Cucamonga, and buyer has bought and agrees to receive from seller, the peaches, to the extent named, grown during the year 1898 on the orchard or land known and described as follows: Sundry orchards in ²³ Ontario and Cucamonga, at the prices and on the terms and conditions named." Then follow the terms, showing the grades and varieties of peaches sold, the minimum and maximum quantities of each, and the price per ton, and then the contract proceeds as follows: "Deliveries shall be made between the twentieth day of July and the first day of September, 1898, and shall conform as far as possible to the mutual convenience of buyer and seller." Then follows a description of the fruit as to quality and size, and after that we quote again: "Payments shall be made as follows: One-half the delivery value within ten days of the date of full delivery, and one-half (the balance) of delivery value within thirty days of the date of final delivery, or the execution of all the terms of this contract by the seller." The contract is signed by the corporation plaintiff as the "seller," and the defendant corporation as the "buyer."

At the trial, it was shown by oral evidence, against the objection and exception of defendant, that the "sundry orchards" spoken of in the written contract referred to, and was confined to, orchards belonging to the stockholders of plaintiff.

It appears that the fruit crop in the districts mentioned in the contract promised well at the date of the making of said contract, and that in an ordinary year the orchards referred to therein would have produced sufficient fruit to carry out the contract, but before it was fully grown the season turned unusually dry and hot, and hot winds impaired the quantity and quality of the fruit to such an extent that it was impossible for plaintiff to furnish, from the orchards of its stockholders in the said districts mentioned in the contract, a quantity of fruit equal to one-half of the minimum amount agreed to be furnished. Plaintiff did, however, furnish to defendant, and de-

fendant received, such fruit as was grown on said orchards of the varieties and qualities described in the contract. When it was apparent that the varieties named in the contract could not be obtained from said orchards to the extent agreed upon, the defendant offered to accept "Salway" peaches in satisfaction of the contract, but the plaintiff failed to comply with this offer. "Salway" peaches were not mentioned in the contract.

The defendant places its contention for a reversal upon three grounds, as follows: 1. The plaintiff could recover ²⁴ nothing without a full delivery of the minimum contract quantity of fruit, as such delivery was a condition precedent to the right to recover anything under the contract; 2. The court erred in permitting plaintiff to explain by oral evidence what was meant by "sundry orchards"; and 3. Plaintiff's refusal to furnish Salway peaches in accordance with defendant's request.

As to the first ground, we think that defendant should not be permitted to accept and retain the peaches of plaintiff, and yet refuse to pay for them. The defendant's agents had inspected the orchards of the stockholders of plaintiff, and it must have known at the time it was receiving this fruit that it was impossible to comply strictly with the contract. The rule is, that "though a contract of sale be entire, and the seller deliver only a part of the goods bargained for, yet if the vendee retain such part, the vendor may recover the value of the part retained, in an action for goods sold and delivered": *Clark v. Moore*, 3 Mich. 55. The acceptance and retention of a part of the goods is treated as a waiver of the condition precedent as to the delivery of the rest of the goods. And where the sale is of specific goods, and the goods perish before delivery, without the fault of the vendor, the vendee has no right of action for failure to deliver on the part of the vendor. This rule applies, also, where it becomes impossible to deliver a part of the property sold, as is illustrated in the English case of *Howell v. Coupland*, L. R. 9 Q. B. 462. As to this case we quote from Benjamin on Sales, section 570, as follows: "The principle of *Taylor v. Caldwell*, 3 Benl. & D. 826, was applied to a case (*Howell v. Coupland*, L. R. 9 Q. B. 462) where the contract was to sell 'two hundred tons of potatoes, grown on land belonging to the defendant in Whaplode.' The potatoes were not in existence at the date of the contract, but the land, when sown, was capable, in an average year, of producing far more than the quantity of potatoes contracted for. There was a failure of the crop from disease, and the vendor was only

able to deliver eighty tons. In an action for nondelivery of the residue, the defendant was held to be excused from further performance, on the ground that the contract was for a portion of a specific crop, and therefore subject to an implied condition that the vendor should be excused if, before breach, performance became impossible from the perishing, without default on his part, of the subject matter of the contract."

²⁵ In the case at bar, the sale having been of specific varieties of fruit growing and to be grown on specific orchards, and the orchards having been so far affected by the extraordinary drought that they did not produce sufficient fruit of the varieties named to comply with the contract, the plaintiff could be compelled to perform the contract only so far as it was possible for it to do so. It could not be made to perform impossibilities, nor was it liable in damages, by way of counterclaim or otherwise, for a failure to comply with its contract resulting from vis major, and not attributable to any fault on the part of said plaintiff. Nor could plaintiff be compelled to substitute other peaches than those contemplated in the original contract of sale. If the sale had been of a specific lot of horses, and half of them had died before delivery, I take it that no one would contend that the vendor could be compelled to substitute other horses before he could recover for such as the vendee had already received. The vendee having accepted a part of the fruit, it should pay for it at the agreed rate, and the loss of the other fruit is the misfortune of the vendee, as well as of the vendor, and neither is liable to the other on account of it: *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415. The furnishing of other peaches for those lost would be substituting a new sale, rather than substantially complying with the original contract of sale. There is nothing in *Remy v. Olds* (Cal., Sept. 1893), 34 Pac. 218, in any way conflicting with the foregoing principles.

There was no error in permitting plaintiff, by parol evidence, to identify the subject matter of the contract. The expression, "sundry orchards in Ontario and Cucamonga," shows on its face that it was not the purpose of the contract to include all the orchards in the districts named, and it therefore became necessary to resort to oral evidence to explain what orchards were meant: *Benjamin on Sales*, sec. 213; *Taylor on Evidence*, secs. 1194, 1195. Nor was there prejudicial error in permitting it to be shown by oral evidence that defendant agreed at the time the contract was signed not to hold the plaintiff bound

to deliver the minimum quantity mentioned in the contract unless that quantity was actually grown on the particular orchards embraced in the contract, because, as we have already seen, that condition could be fairly implied from the written agreement, and it could do no ²⁶ harm to prove by oral evidence that which was already established by the written contract.

The judgment and order should be affirmed.

Chipman, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Henshaw, J., Temple, J.

Sales of Property not in Existence are considered in the monographic note to *Forsyth Mfg. Co. v. Castlen*, 81 Am. St. Rep. 42-46. The performance of an absolute contract to sell and deliver at a certain time, goods to be manufactured by the seller, is not excused by the breakage of the machinery of his manufactory: *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899. And under a contract to grow, sell, and deliver certain quantities of specified kinds of beans, a failure to deliver the entire quantity is not excused by an early frost destroying or injuring the crop to such an extent that the grower is unable to deliver the entire quantity from beans grown by him; See the monographic note to *Huyett v. Chicago Edison Co.*, 59 Am. St. Rep. 292. Consult, in this connection, *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 495. The performance of contracts, generally, is excused by the destruction of the subject matter; *Angus v. Scully*, 176 Mass. 357, 79 Am. St. Rep. 318, 57 N. E. 674. See, in this connection, *Blakely v. Sousa*, 197 Pa. St. 305, 80 Am. St. Rep. 821, 47 Atl. 286; *Middlesex etc. Co. v. Knappman etc. Co.*, 64 N. J. L. 240, 81 Am. St. Rep. 467, 45 Atl. 692. Thus, where a contract is made for the sale of specific chattels and they are destroyed by fire before delivery, the vendor is not liable for damages sustained by the vendee: *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415.

Sale.—A vendor cannot recover for a partial performance of a contract of sale if the contract is entire, though he may if it is severable: See the monographic note to *Huyett v. Chicago Edison Co.*, 59 Am. St. Rep. 291-293.

Sale.—Under a contract to sell a particular thing, the vendor cannot substitute an article of similar kind, without the consent of the vendee: *Webster-Gurber Marble Co. v. Dryden*, 90 Iowa, 37, 48 Am. St. Rep. 417, 57 N. W. 637; *Columbian Iron etc. Co. v. Douglas*, 84 Md. 44, 57 Am. St. Rep. 362, 34 Atl. 1118.

EX PARTE ANDERSON.

[134 Cal. 69, 66 Pac. 194.]

CONSTITUTIONAL LAW—REFERENDUM LEGISLATION.
A statute providing that whenever a petition is presented to the board of supervisors, signed by legal voters equal in number to fifty per centum of the votes cast at the last preceding election, asking that an ordinance set forth in the petition be submitted to the qualified voters in the county, such board must, by proclamation, submit such ordinance to the vote of the qualified voters, and that if a majority of the votes cast is in favor of the adoption of the ordinance, the board must proclaim that fact, and that the ordinance shall have the same effect as if adopted by the board of supervisors, is unconstitutional, especially if, under other provisions of the same statute, there is given the board of supervisors full power to make laws for the government of the county. There cannot be, for the same county, two equal, co-ordinate law-making powers, each existing without any restrictions the one upon the other. (p. 239.)

Habeas corpus. The petitioner was convicted of violating an ordinance adopted as shown in the opinion of the court.

H. L. Poplin and S. M. Swinnerton, for the petitioner.

F. W. Ewins, district attorney of Ventura county, and C. U. Wright, E. C. Bower, and Lewis W. Andrews, for the respondent.

⁷⁰ HENSHAW, J. Petitioner was convicted of violating an ordinance of the county of Ventura, adopted by a vote of the electors of the county at an election held in November, 1900, under the provisions of section 13 of the county government act of 1897: Stats. 1897, p. 44. He contends that the ordinance under which his conviction was had is unconstitutional and void.

Section 1 of article 11 of the constitution reads as follows: "The several counties, as they now exist, are hereby recognized as legal subdivisions of this state."

Section 4 of article 11 of the constitution provides that "the legislature shall establish a system of county governments which shall be uniform throughout the state."

Section 5 of article 11 of the constitution ordains that "the legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs [etc.], and shall prescribe their duties, and fix their terms of office."

Section 11 of article 11 of the constitution declares that "any county, city, town, or township may make and enforce

within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

Section 1 of the county government act of 1897 provides that "the several counties of this state, as they now exist, . . . are bodies corporate and politic, and, as such, have the powers specified in this act, and such other powers as are necessarily implied." By section 2, "their powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law"; and by subdivision 25 of section 25, boards of supervisors are empowered "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law," etc.; while, by subdivision 31 of the same section, boards of supervisors are authorized "to make and enforce, within the limits of their county, all such local, police, sanitary, and other regulations as are not in conflict with general laws."

While thus defining the powers of boards of supervisors as the constitution enjoins upon the legislature to do, concurrently, in the same act, and by section 13 thereof, the legislature declares: "Whenever there shall be presented to the board of supervisors a petition or petitions, signed by legal voters of said county, equal in number to fifty per cent of the votes cast ⁷¹ at the last preceding election, asking that an ordinance, to be set forth in such petition, be submitted to a vote of the qualified voters of such county, it shall be the duty of the board of supervisors, by proclamation, to submit such proposed ordinance to the vote of the qualified electors of such county. Such election shall be held within thirty days after the first regular meeting of the board after the filing of such petition. The ballots used at such special or general election shall contain the words, 'For the ordinance' (stating the nature of the ordinance), and 'Against the ordinance' (stating the nature of the ordinance). The election shall be conducted and the returns canvassed in all respects as provided by law for the conducting of general elections and the canvassing the returns thereof. . . . If a majority of the votes cast upon such ordinance shall be in favor of the adoption thereof, the board of supervisors shall proclaim such fact, and upon the publication of such proclamation such ordinance, thus adopted, shall have the same and equal force and effect as though adopted and ordained by the board of supervisors."

The license, for a violation of the terms of which this petitioner was convicted, was a license regulating the sale of intoxi-

cating liquors, and was adopted in accordance with this last-quoted section. At the time of its adoption there was an ordinance covering the same subject matter regularly passed by the board of supervisors of the county.

The legislative design disclosed by section 13 of the county government act is clear and unmistakable. It is a direct grant of power to the voters of a county, or rather to a majority of such voters as may choose to exercise their right of franchise at an election, to pass any and all ordinances pertinent to the government of their county. The petitioners frame and present, without interference from or control by the board of supervisors, the precise ordinance or ordinances which they may desire to have adopted, and those ordinances as presented, if they meet with popular favor, are declared to be and to become valid ordinances of the county, "having the same and equal force and effect as though adopted and ordained by the board of supervisors."

With this for the manifest purpose and object of the law, two questions present themselves: 1. Can the legislature confer directly upon the electors of a county the power to make its laws? and 2. Is the exercise by the legislature of this ⁷² attempted power, manifested in section 13 of the county government act, valid and legal?

1. Under the views which we hold, it is perhaps unnecessary to decide the first of these questions, but it may be remarked, that, while the state recognizes in various forms the right of the electors to a voice in controlling the subject matter of legislation, this is the first instance where the absolute and uncontrolled power of legislation is taken away from the legislative body, in which heretofore it has always been confided, and has been bestowed upon the electors. And further, it may be remarked that there is nothing in the constitution of the state expressly authorizing this kind of legislation. Constitutional amendments are submitted for approval or rejection to the voters of the state, but the form and substance of the amendments have first been determined by the regularly authorized law-making power. Upon the question of bonded indebtedness, and upon the question of amendments of their charters, the voters of a municipality are allowed a determinative voice; but the matter of the amendment, and the terms of the bonded indebtedness, and the purposes for which it shall be incurred, are all first the subject matters of legislative review by the law-making power of the municipality—its board of trustees or city

council. Even in *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425, the law under consideration only authorized the electors of the township, city, or town to petition the board of supervisors to call an election, at which there should be obtained an expression of the voters upon the question of licensing or not licensing the liquor traffic, and it was provided that if a majority of the votes cast were "for no liquor license," then no license should be granted within such township, city, or town. The decision of this court was against the validity and constitutionality of the act, yet it will be observed that the law there under consideration was of very limited scope and applicability. It was a so-called "local option law," whereby, if the voters decided against licensing the liquor traffic, no license was to be issued, but if, upon the other hand, their decision was in favor of licensing the liquor traffic, it was still left to the law-making power to prescribe, by appropriate ordinance, the terms and conditions regulating the business. In the case at bar, however, it is to be borne in mind that the right to make any and all laws, such as heretofore the supervisors ⁷³ could make, is directly conferred upon the people. That this is a startling innovation upon the governmental system recognized in this state since its earliest existence is at once apparent. But whether or not the legislature has the power so to do is a question the determination of which may well be deferred until some later occasion, in view of the fact that its attempted exercise of that power in this instance is clearly invalid. It will call for determination when the question is fairly presented under legislation well advised and maturely considered. It need not here be passed upon, for the reason that this drastic departure from our form of government finds expression only in imperfect and incomplete legislation, embodied in a single clause of the county government act.

2. For, if it be conceded (as here it may be, though it should be distinctly added that the concession is not a determination of the first proposition) that the legislature has the power which it has attempted to exercise, it is too plain to permit of argument that, under our system of government, there never can be two equal, co-ordinate law-making powers, each existing without any restrictions the one upon the other. Yet such is the precise case presented, and apparent from an inspection of the sections of the constitution and of the county government act above quoted. Upon the one hand, there is conferred upon the board of supervisors, as has been the uni-

versal rule, full power to make all laws pertaining to the government of the county. Upon the other hand, this identical power is bestowed by the machinery of the ballot upon the voters of the county. When an ordinance is thus passed by ballot, it has no superior force, but has merely "the same and equal force and effect as though adopted and ordained by the board of supervisors." The right of the supervisors to repeal such ordinances is not taken away, and it is within their power to repeal them one after the other as soon as they shall have been adopted. Upon the other hand, it is equally the right of the people to re-enact them after such repeal. It is the old problem of the irresistible force meeting the indestructible barrier. So far as legislation is concerned, nothing could result but untold confusion. As the two sets of laws, -thus creating co-ordinate law-making powers, without check, limitation, or restraint, the one upon the other, cannot, in the nature of our government, ⁷⁴ exist, it follows that one or the other of the provisions is invalid and must fall. There can be no hesitation in declaring, in this case, that it must be section 13 of the county government act.

By reason of the invalidity of said section, the ordinance adopted in accordance with it is likewise invalid, and the petitioner is entitled to his discharge. It is ordered accordingly.

McFarland, J., Harrison, J., and Temple, J., concurred.

VAN DYKE, J., concurring. I concur. When the constitution says that any county, city, etc., may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general law, it uses the terms "counties" and "cities" in their organized condition, or as bodies politic; it does not mean that the people of the county or of the city, in their individual capacity, may do these things.

The terms employed in framing a constitution or in the enactment of laws by the legislature are to be construed as they were generally understood at the time. Our system of government is not that of a pure democracy, but it is a representative republic. This holds throughout, from the smallest subdivision, such as cities and towns, up through counties and states, to the federated or national government. The people, in their individual capacity, do not make or enforce laws to govern them, but they delegate the power to their agents to make laws, and also to construe and enforce them.

The power to enforce is coupled with the power to make local, police, and sanitary regulations, recognizing the obvious fact that laws are useless unless they can be enforced. No one will pretend that the people of the county, in their individual and unorganized condition, can enforce any legislative act or ordinance; that must be done by and through the proper officers and agencies recognized by the constitution and general laws of the state. Under the rule, "*Expressio unius est exclusio alterius*," the legislature has no authority to create any other public, corporate bodies or agencies than those specified in the constitution, and clothe them with the power to make and enforce local, police, sanitary, and other regulations: *Ex parte Werner*, 129 Cal. 567, 62 Pac. 97.

Garoutte, J., concurred in the concurring opinion.

⁷⁵ BEATTY, C. J., dissenting. I dissent. The constitution (article 14, section 11) makes a direct grant to every county of the power to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." This grant to the counties of the power of local legislation is, of course, a grant to the people of the respective counties. How they are to exercise the power, whether in their primary capacity by voting at the polls, as in the case of the adoption of a state constitution or of amendments thereto, or by their chosen representatives in boards of supervisors, is purely a matter of legislative regulation, and I cannot see how it is possible, upon any recognized principle of constitutional construction, to deny to the legislature the power to confer upon the qualified voters of the respective counties the right to make local laws which will be valid and effective within their territorial limits.

That the legislature did intend by the act of 1897 to enable the people of the respective counties to enact local ordinances by popular vote is not, and cannot be, denied; but their intention is held to have failed, because they have left it in the power of the boards of supervisors to repeal or alter or supersede the ordinances ratified by popular vote. I do not agree with this construction of the act; but if it were conceded to be correct, or if the legislature had incorporated in the act, in express terms, what the court construes it to mean—if, in other words, the legislature, instead of stopping with the declaration that "such ordinance, thus adopted, shall have the same and equal force and effect as though adopted and ordained by the

board of supervisors," had added an express proviso that the board of supervisors might, in their discretion, alter or repeal ordinances so adopted—I am not aware of any rule of construction or principle of constitutional law upon which a court could declare the law invalid. It might well be argued that such a law would be inexpedient, or even foolish, but laws cannot be invalidated upon that ground. They are only invalid when the legislature has exceeded its powers in attempting to enact them. Here, upon the construction given to this law, there is no excess of power—only an absurdity, or supposed absurdity, in the possible consequences to which it may lead. This, however, I conceive to be a more potent argument against the construction placed upon the act than against the power of the legislature to pass it.

⁷⁶ And finally, are the possible consequences of the court's construction of the law so very absurd? Suppose the board of supervisors has the power to repeal an ordinance which has been ratified by popular vote. It is a power which, it may be presumed, will not be exercised in any case of doubtful expediency. The expression of the popular will would have a moral and practical force in any event, and in many cases would operate permanently. As to the confusion and uncertainty which it is feared might result, I see no reason for apprehension. It is conceivable, of course, that there would sometimes be found a board of supervisors determined to thwart the will of the people of their county, and that they would repeal ordinances as fast as the people could pass them, but this, it may be safely asserted, would rarely occur, and in such rare instances the mischief would be less in degree than frequently follows when the legislature undoes what its predecessors have done.

I think the ordinance is in every respect valid, and the prisoner should be remanded.

The Delegation of Legislative Power to minor municipalities and to the people is discussed in *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910; *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325, and cross-reference note thereto, 44 N. E. 853; *Anderson v. Manchester etc. Assur. Co.*, 59 Minn. 182, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; *Ex parte Brown*, 38 Tex. Cr. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 675.

EX PARTE McCLAIN.

[134 Cal. 110, 66 Pac. 69.]

CONSTITUTIONAL LAW—LOTTERY TICKETS.—A municipal ordinance making it unlawful for any person to have in his possession any lottery ticket is valid. If the constitution of the state empowers municipalities to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. (pp. 244, 245.)

N. S. Wirt and A. S. Newburgh, for the petitioner.

Charles L. Weller, assistant district attorney, for the respondent.

¹¹⁰ HENSHAW, J. By ordinance No. 68 of the city and county of San Francisco it is made "unlawful for any person to have in his possession any lottery ticket," etc., and upon conviction of a violation of the terms of the ordinance the defendant may be punished by fine or imprisonment, or both. The petitioner here was convicted of a violation of this ordinance, and seeks his release under this writ, upon the asserted ground that the ordinance in question is unreasonable and void.

The United States government refuses the use of its mails to advertising lotteries, transmission of lottery tickets, the announcement of the winning numbers in lotteries—in short, to the sending of any literature in aid of such gambling schemes—and it makes penal the violation of its laws in any of these respects. The state of California, by its penal laws, prohibits the setting up of a lottery, and declares it to be a misdemeanor for any person to sell a lottery ticket. There are, then, against all gambling devices of this kind, not only the public policy of the general government and of this state, but also the express mandate of their criminal laws, so that the avowed policy and ¹¹¹ the expressed intent is to stamp out, by penal legislation, the traffic in lottery tickets. It is true that the state, while declaring it to be a penal offense to sell a lottery ticket, has not made the purchaser equally culpable. But no one will question the right of the state to declare, if it sees fit so to do, that the purchaser of a lottery ticket, equally with the seller, is guilty of a misdemeanor. It may be concluded, therefore, that in a reasonable exercise of its police powers a municipality may pass any ordinance in furtherance of the avowed general

policy of the national and state government. In this regard our cities and counties draw their power, not from legislative permission, but from the direct grant of the constitution itself, which, by section 11 of article 11, empowers them to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

The matter of this ordinance being, then, clearly one of police regulation, and the power to pass such ordinances being expressly conferred upon a municipality, there is left for consideration the question whether the exercise of that power in this instance be unreasonable or oppressive for the accomplishment of the end in view.

Against its validity it is urged that it is unreasonable, in making the mere possession, without reference to any ultimate intent of the possessor, an offense, and, as is usual when a law is attacked upon this ground, harrowing instances are cited—as of a blind man to whom might be given a lottery ticket, he not knowing it to be such, or of another into whose pocket might be thrust the damnatory paper without knowledge upon his part that it was in his possession, and even—so run the argument and citations—the peace-officer who arrests a violator of the law, and takes into his own custody the criminatory evidence, is, under the terms of this ordinance, equally guilty. But the answer to all this is the answer that has been made by every court as often as the argument has been pressed to consideration. The matter is discussed in *Ex parte Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68, wherein is quoted the language of Mr. Justice Field in *United States v. Kirby*, 7 Wall. 482, which may well be repeated here: “General terms should be so limited in their application as not to lead to injustice or oppression, or an absurd consequence. It will always be presumed that the legislature ¹¹² intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.” This kind of legislation is not new to jurisprudence, nor novel upon the statute books of this state; yet it has never been found necessary to overthrow a law, otherwise valid, because in some supposititious case a person might be charged with its violation, who came within the letter, yet not within the spirit, of the enactment. An ordinance of this city and county, for example, prohibits the carrying of a concealed weapon. It is the mere carrying, under the letter of the law, which constitutes the offense, not a carrying with in-

tent to commit some act of violence. Yet this court has found no difficulty in upholding the law: *Ex parte Cheney*, 90 Cal. 617, 27 Pac. 436. The citizen who bought a pistol or knife at a gun store, caused it to be wrapped in a parcel, and proceeded to carry it to his home, might be said, under the letter of the law, to have committed a violation of it. Yet he has not violated the spirit of the law, and the law would hold him guiltless. The statute books of this and other states abound in provisions for the protection of fish and game, and amongst them is commonly found a law making it penal for one, within certain designated months, "to have in his possession" fish or game of prescribed kinds. In such laws it is not the purpose of the possession, but the fact of possession, which *prima facie* establishes the offense. And so, while, in their construction of the game laws, courts have differed as to their scope—some holding that the defendant was exculpated if he showed that the game in his possession was killed without the boundaries of the state, others holding that it applied equally to game so destroyed—in all cases there has been an agreement by the courts that the fact of possession *prima facie* evidenced a violation of the act: *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. McGuire*, 24 Or. 370, 33 Pac. 666; *Commonwealth v. Wilkinson*, 139 Pa. St. 304, 21 Atl. 14; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, and note, 37 Pac. 402; *State v. Judy*, 7 Mo. App. 524; *Bellows v. Elmendorf*, 7 Lans. 462; *People v. Fishbough*, 134 N. Y. 393, 31 N. E. 983.

The design of the ordinance is to stamp out lotteries and the traffic in lottery tickets. For if there were no buyers of lottery tickets, there would be no sellers of them, and while, as has been said above, by the state law only the seller is made ¹¹³ culpable, it is clearly within the power and province of the municipality, in its endeavor to eradicate the evil, to hold the purchaser or possessor also culpable.

In the case of *In re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 693, the attention of the court was directed more particularly to the requirements of the ordinance which seemed to exact from the defendant proof of his innocence. If a variance shall be thought to exist between the views there expressed and those here announced, it need but be said that we are satisfied that the foregoing enunciates a sound principle of statutory construction.

For the reasons above given the writ is discharged and the prisoner remanded.

McFarland, J., and Beatty, C. J., concurred.

GAROUTTE, J., concurring. I concur in the judgment, but deem the language of Justice Field, cited in the main opinion, entirely too general to serve as authority in support of the conclusion here declared. Neither am I at all disposed to agree to the reasoning contained in the opinion of the court promulgated in *Ex parte Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68. At the same time, I see no reason why the law-making power may not declare that the possession of a lottery ticket by a person shall constitute a misdemeanor. The statute clearly means a possession knowingly, and so construed, there is no legal objection to its validity: *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 337, 37 Atl. 172; *Ex parte Mon Luck*, 29 Or. 221, 54 Am. St. Rep. 804, 44 Pac. 693.

Lottery Tickets.—A statute making it criminal for a person to have in his possession any lottery ticket is constitutional: *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 337, 37 Atl. 172. But ordinances making it a crime for any person to have such a ticket in his possession, unless such possession is shown to be innocent or for a lawful purpose, have been declared unconstitutional: *Ex parte Kameta*, 36 Or. 251, 78 Am. St. Rep. 775, 60 Pac. 394; *In re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 693. See the monographic note to *Booth v. People*, 78 Am. St. Rep. 235-274, on the power of the legislature to declare acts criminal.

HOYT v. STARK.

[134 Cal. 173, 66 Pac. 223.]

THE FILING OF AN UNDERTAKING ON APPEAL MUST BE BY OFFERING IT TO THE CLERK AT HIS OFFICE, and the giving of it to that officer or his deputy at a place remote from his office and out of office hours, though he there marks it filed, is not a filing, nor can it become such on his depositing the paper in the proper place in his office on the next day, so as to relate to the time when it was so left with such officer. (p. 247.)

A PAPER IS FILED ONLY when deposited with the proper clerk at his office, if such filing carries notice or affects private rights. (p. 247.)

AN APPEAL WILL BE DISMISSED IF THE UNDERTAKING in support thereof is not filed within the time required by the statute. (p. 249.)

A. H. Jarman, for the appellant.

Charles W. Davison and J. H. Russell, for the respondent.

¹⁷⁹ HENSHAW, J. This is a motion to dismiss an appeal. The uncontroverted facts are the following: The office of the county clerk of Santa Clara county opens at 9 A. M., and closes at 5 P. M. After the hour of 5 P. M., appellant's attorney went to the office of the county clerk to file his undertaking upon appeal. It was the last day allowed him by law for this purpose. Finding the office closed, he went to a social club in the city of San Jose, where he found one of the deputy county clerks. To him he explained the circumstances. The deputy took the undertaking and indorsed it as filed upon that day and date. At 9:30 A. M., upon the following day, respondent's attorney visited the clerk's office, examined the proper books and registers, and found no record of the filing in the clerk's office of the necessary undertaking. Thereafter the deputy county clerk to whom had been intrusted the undertaking, arriving at the office, delivered the bond to a fellow-deputy, who placed it in its proper receptacle and made in the proper books the entry of its filing.

The single question thus presented is, whether, under section 940 of the Code of Civil Procedure, the undertaking was filed in time. That section, in terms, requires a filing "with the clerk of the court in which the judgment or order appealed from is entered." It is necessary for the appealing party so to file within five days after the service of his notice of appeal. The adverse party thereafter has a limited time within which to except to the sufficiency of the undertaking, and to call upon the sureties to justify. The undertaking may be filed at any time within the five days, but may not be filed thereafter. Respondent's time for objection begins to run, not from the expiration of the five days, but from the time of actual filing, which may be upon any day within the five days. No actual notice is required to be given to the respondent's attorney. It becomes his duty, therefore, to watch the office, and learn from an inspection of the proper records whether the undertaking has been filed. But if no such undertaking shall have been filed at the expiration of the five days, his duty in this regard is at an end. "It is clearly intended that the adverse party shall not be compelled to watch the clerk's office for the filing of an undertaking more than five days after he has notice of the filing of the notice of appeal": *Boyd v. Burrell*, 60 Cal. 280. As the only method by which the adverse party can acquire¹⁸⁰ his knowledge is from an inspection of the proper records of the county clerk's office, it would seem inevitably to follow

that the meaning of the law is, that the appealing party shall offer for filing to the clerk, at his office, the requisite undertaking within due time. If he shall do this, under the familiar principle that private rights will not be impaired by the failure of public ministerial officers to do their duty, upon the one hand he will not be compelled to see that the proper entries of filing are actually made, but upon the other hand the respondent, upon the appeal, will likewise not be permitted to suffer for any dereliction of which the clerk may be guilty. But all this presupposes a compliance with the law in the attempted matter of the filing, and in this we think something more is contemplated than a haphazard delivery to the officer, wherever he may chance to be found. Constructive notices, notice and knowledge charged by filing and recordation, form a very essential part of our system of jurisprudence and of our de-rainment of title. In all cases the law has provided a proper officer and a known office in which he is to transact his official business. Regardless of the varying phraseology of the statutes, in contemplation of law a paper whose filing carries notice, or affects private rights, is filed only when deposited with the proper officer at his office for this especial purpose. We do not mean by this that there are not many acts which a ministerial officer may do outside of the four walls of his office. Nor do we mean to be understood, as has been said, that when a proper filing or offer of filing has been made by a party, that he shall suffer for the remissness of the clerk in the performance of his duty. But the proper offer means more than a mere presentation to the officer. It means a presentation to him at the proper place, and within the proper time. When this has been done, the party is required to do no more, and he will not be endangered in any of his rights by the failure of the clerk, in turn, to perform his duty. As was said in *Tregambo v. Comanche etc. Min. Co.*, 57 Cal. 501: "Filing a paper consists in presenting it at the proper office and leaving it there, deposited with the papers in such office." *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796, is also here in point. That case turned upon the time of recordation of two separate instruments, both affecting the same property. The one had been presented at the recorder's office, and deposited with the recorder, at an hour too late to entitle it to recordation upon that day, but it was ¹⁸¹ left at the proper office, and with the proper officer, and with the request that it be recorded by him immediately upon the opening of his office on the fol-

lowing morning. The other paper was given to the recorder on his way to his office, upon the following morning, with a like request that it be recorded immediately upon the opening of his office. The recorder entered upon his record the time of filing of the two instruments as of the same day and moment. This court, in reviewing the cases, declared: "An instrument is filed for record when it is deposited in the proper office, with the person in charge thereof, with directions to record it. . . . Delivering an instrument to the proper officer, at a place other than the office where it is required to be filed, is not sufficient, even though the officer indorse it as properly filed." And so it was held that the instrument presented at the recorder's office in the afternoon took precedence as to time of recordation over that which was delivered to the recorder upon the street the following morning.

When section 940 of the Code of Civil Procedure speaks of filing the undertaking with the clerk, it means distinctly that it is to be presented for filing to him at his office. It would scarcely be said that if the attorney had found a deputy clerk traveling in another part of the state, and had there delivered to him the paper in question, and the clerk had carried it about with him until, his vacation being ended, he had returned to his office and its duties, that this would have been a compliance on the part of the litigant with what the law contemplates shall be done. It is the duty of the litigant, wherever he may find the officer, to see to it that within the time contemplated by law the paper shall have been deposited in the office, and it not infrequently happens that where, through negligence or unavoidable delay, cases such as this arise, the attorney accompanies the officer to his office, and there makes proper proffer of the paper; and this, as the law in such matters does not regard fractions of a day, may be done even at an hour when the general business of the office is suspended. In this case this was not done, and the adverse party, watching the clerk's office, as was his duty to do in protecting the interests of his client, found that after the expiration of the five days no undertaking upon appeal had been filed. We conclude, therefore, that the filing was not in time. Heretofore there has been some diversity of opinion as to whether, under ¹⁸² circumstances such as this, the filing of a proper undertaking within proper time being jurisdictional, upon a failure so to do the appeal should be dismissed by this court, or simply ignored as having no legal existence. This matter, however,

has been finally settled by the case of Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813.

The appeal, therefore, is dismissed without prejudice to the prosecution of a new appeal.

Garoutte, J., McFarland, J., Harrison, J., Van Dyke, J., and Beatty, C. J., concurred.

Filing a Paper consists in placing it in the proper official custody of the party charged with the duty of filing it, and the receiving of it by the officer, to be kept on file: Meridian Nat. Bank v. Hoyt, 74 Miss. 221, 60 Am. St. Rep. 504, 21 South. 12; Hook v. Fenner, 18 Colo. 283, 36 Am. St. Rep. 277, 32 Pac. 614. See the monographic note to Beebe v. Morrell, 15 Am. St. Rep. 294-298, on the filing of papers.

TAUSSIG v. BODE.

[134 Cal. 260, 66 Pac. 259.]

WAREHOUSEMEN—BURDEN OF PROOF.—If liquor is stored in a warehouse, and it is subsequently found that there has been excessive loss, apparently from leakage, the burden of proof is on the bailor to show that the leakage was caused by the fault of the bailee. (p. 251.)

CONTRACT—NOTICE, WHEN A PART OF.—IF ON THE MARGIN OF A WAREHOUSE RECEIPT for casks of spirits received for storage is printed a notice, "Loss or damage by fire, the elements, shrinkage, leakage, or natural decay at the owner's risk." such notice is a part of the contract. (p. 253.)

CONTRACT, PRESUMPTION THAT PARTY READ.—If a notice is printed on the face of a brief warehouse receipt, the presumption is that the party to whom it was given read it, as it was his duty to do. (p. 254.)

WAREHOUSEMEN, WHEN RELEASED FROM LIABILITY BY NOTICE ON RECEIPT.—If a warehouse receipt has a notice printed on its face declaring that leakage is at the owner's risk, when he stores spirits in casks and accepts such receipt, it is a warning that loss by leakage is at his risk, and he cannot recover of the warehouseman therefor, if not due to the fault of the latter. (p. 254.)

WAREHOUSEMEN ARE RELEASED FROM THE DUTY OF INSPECTING CASKS of spirits in storage with them for the purpose of detecting leakage by a notice on their receipt declaring leakage to be at the owner's risk. By such notice the duty of making such inspection must be performed by the bailor. (p. 254.)

WAREHOUSEMAN'S LIABILITY—RIGHT OF TO LIMIT.—There is no public policy forbidding a warehouseman from limiting his liability for loss or deterioration caused by the inherent qualities in the articles stored or by defects in the vessels containing them. (p. 254.)

WAREHOUSEMEN.—The piling or arranging of casks so as to make their inspection difficult cannot constitute a ground of recovery against a warehouseman, where the duty of making such

inspection rests on the bailor, who never attempts to perform it. (p. 255.)

WAREHOUSEMAN DOES NOT OWE THE DUTY, when casks of spirits are stored with him by their owner, who has been negligent or has used defective cooperage, to use ordinary care to discover or prevent leakage, when his receipt declares that leakage is at the owner's risk. (p. 256.)

George T. Wright, for the appellant.

Reinstein & Eisner and M. S. Eisner, for the respondents.

²⁶³ **BEATTY, C. J.** The defendant is proprietor of a bonded warehouse in the city of San Francisco. On the 20th of January, 1896, it received from the plaintiffs, and stored in its warehouse, sixty-four barrels of spirits. About the 4th of March following, it discovered that some of the barrels were leaking, and immediately notified the plaintiffs, who, upon examination, found that eight barrels showed excessive outage. One barrel was practically empty, three or four leaking badly, and the others to some extent. The total amount of loss, over and above the ordinary allowance for evaporation, was one hundred and eighty-one and one-half gallons, equal to two hundred and twenty-five and one-half proof gallons, of the value of four hundred and thirty-four dollars and fifty cents. The plaintiffs sue to recover that amount, and charge, by the first count of their complaint, that the loss was due to leakage caused by the careless, negligent, and improper handling and storage of the barrels by the defendant. In a second count they simply allege a delivery of the sixty-four barrels to defendant on a contract of storage, and a failure and refusal of the defendant to redeliver on their demand one hundred and eighty-one and one-half gallons of the amount stored. The cause was tried by a jury, upon evidence relating almost exclusively to the first count, and the instructions requested by the parties and given or refused by the court bore mainly upon the measure of defendant's responsibility for a loss caused by leakage from the barrels during the time they remained on storage.

The jury brought in a verdict for the plaintiffs, and the defendant appeals from the judgment and from an order denying a new trial.

Some question is made as to the sufficiency of the evidence to sustain the verdict, and with reference to this point there is a controversy as to the burden of proof, but as to this little need be said. We agree with respondents, that in a case of this character, proof of the deposit and of failure of the bailee

to redeliver in accordance with the terms of the contract, makes a *prima facie* case, and that the burden is upon the warehouseman to excuse the failure to redeliver; but we also agree with the appellant that when, as in this instance, he shows a return of the packages stored, and that the contents have been lost by leakage, the burden shifts to the plaintiff to prove affirmatively that the leakage was caused by the fault of the bailee. This was the principle decided in *Wilson v. Southern Pacific R. R. Co.*, 62 Cal. 164, and it is entirely reasonable and just. But even in this view there was evidence sufficient to sustain the verdict for plaintiffs, if the instructions of ²⁶⁴ the court correctly stated the law. Not that the defendant was shown to have stored or handled the casks improperly, which is one of the things that the plaintiffs undertook to prove, but only because there was a failure on the part of defendant, according to the rule laid down by the court, to make sufficiently frequent and careful inspection of the casks for the purpose of determining whether they were leaking.

There was an effort to prove that the warehouse was improperly constructed or badly arranged, so that the casks were exposed to drafts, the effect of north winds, etc., causing shrinkage of the staves. But upon this point we think there was a failure of proof, while on the other hand there was very strong evidence that the casks that leaked were faultily constructed. And besides, the plaintiffs knew, or had the means of knowing, all about the arrangement and situation of the warehouse, whether and to what extent it was exposed to drafts or north winds, how casks were ordinarily piled and arranged on the floor, and in what position, with reference to the doors of the warehouse, these sixty-four casks were placed.

It was shown, however, that the casks were piled in a double tier—chime to chime—and two tiers high, with no passageway between, so that one head of each cask was concealed from view as they lay, and so that they could leak at the covered ends without discovery.

Under the instructions of the court, the jury were at liberty to find that this was actionable negligence on the part of the defendant, and in view of the extreme weakness of the evidence as to any other fault or negligence of the defendant, we are justified in assuming that the verdict was based wholly upon a finding of negligence in this particular, and, at all events, the verdict cannot be sustained if the jury were erroneously in-

structed to the prejudice of the defendant in respect to this matter.

Whether it was actionable negligence on the part of the defendant to fail to inspect the casks for the purpose of detecting leakage, depends primarily upon the terms, express or implied, of the contract of storage, construed in the light of the circumstances of its execution. The only circumstances material to be considered in connection with the terms of the contract as contained in the warehouse receipt are, that the plaintiffs had been storing spirits in the defendant's warehouse for several months before these sixty-four casks were stored in January, 1896; that the practice was to have the spirits shipped directly ²⁶³ to the warehouse; that on the arrival of a carload the plaintiffs were notified, and sent their agent to inspect the goods, and especially to see that the cooperage was all right—to see, in other words, that the casks were in a condition to be safely stored. Both parties were equally well informed as to the volatile nature of spirits, and the danger of loss from leakage and evaporation. On the arrival of these sixty-four casks at the warehouse, the plaintiffs were notified, and, in accordance with their usual practice, sent their agent to inspect the cooperage. Both he and the agents of defendant satisfied themselves that the barrels were in good condition and fit to be stored, and thereupon the defendant issued its receipt, in the following terms:

Parties are reminded that transfers of merchandise are not complete unless made on the books of the warehouse.

GENERAL INTERNAL REVENUE BONDED WAREHOUSE No. 1.

First District of California.

No. 121.

BODE & HASLETT, Proprietors.

N. E. cor. Third and King Streets.

SAN FRANCISCO, January 20, 1896.

Received on storage from Louis Taussig and O.

<i>Distiller and Brand.</i>	<i>Numbers.</i>	<i>No. of Packages.</i>
American Dist. Co.	134901-964	64 sixty-four bbls. spirits.

Non-negotiable.

**BODE & HASLETT.
W. A. JAMES.**

This receipt is given in accordance with the California warehouse laws, as well as the laws of the United States. Loss or damage by fire, the elements, shrinkage, leakage, or natural decay, at owner's risk.

Counsel for the respective parties differ as to the effect of the notice printed on the face of this receipt, that loss by leak-

age was at the owner's risk. Respondents claim: 1. That the notice is no part of the contract; and 2. That even if it is treated as a binding stipulation, it could not exempt the appellant from liability for loss by leakage, which, as they contend, might have been discovered and prevented if the casks had been inspected from time to time, or if they had been piled in a single tier, leaving both ends exposed to view. Both of these propositions are controverted by the appellant, and upon their determination the case seems to depend. We think it clear that the notice is a part of the contract. It was printed ²⁰⁶ plainly on the face of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents, if they had the opportunity, and their opportunity was ample. The presumption, therefore, is, that they did read it. Against this presumption there is no evidence, and none, we think, would have been admissible to show that the respondents had failed to do what their duty required them to do. Assuming, then, that they read the receipt, and, whether they did or not, that they are chargeable with knowledge of its contents, they had fair warning that any loss by leakage was at their risk, or in other words, that the appellant declined all responsibility for loss by leakage. Their acceptance of the receipt and storage of the goods with knowledge of this condition made it binding upon them, as one of the terms of the contract. The cases cited by counsel in which it has been held that notices printed or stamped on bills of lading, but not signed by the consignors, do not exempt common carriers from their common-law liability are not in point. They rest upon the peculiar nature of the public duties of common carriers, and the public policy of preventing them from limiting their liability by mere notices not expressly assented to by the shippers. The principle of those decisions is very clearly stated by Mr. Justice Davis, delivering the opinion of the supreme court of the United States in *Michigan Central R. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 328. The case of warehousemen is entirely different. There is no public policy to be infringed by stipulations limiting their liability for loss or deterioration caused by the inherent qualities of the articles stored, or by defects in the vessels containing them. They are not bound to receive articles offered for storage, and may make such terms as they choose to impose as conditions of their contract. In this case we think that it was clearly one of the terms of appellant's contract that it should not be responsible

for loss by leakage. This, of course, would not exempt it from liability for leakage due to its fault, but did exempt it from the duty of watching these casks to detect leakage caused by defects in the casks, or resulting from any cause other than improper handling or storage. If prudence required the casks to be watched or inspected from time to time to see whether they were leaking, that duty devolved upon the respondents, not upon the appellant. And there was nothing to prevent the respondents from making such inspection as often as they ²⁶⁷ desired. The warehouse was open to them, but, so far as appears, they never sent any person to look after these goods until they were notified by appellant of the leakage discovered by those in charge of its warehouse. This, it seems to us, is an answer to their complaint as to the manner in which the casks were piled, in a double instead of a single tier. There is no satisfactory evidence that such mode of piling was either unusual or improper, but if we assume that it was improper, for the reason that it prevented convenient inspection, in the absence of any attempt at inspection by respondent, upon whom the duty rested, the improper piling of the casks was of no consequence. If they had gone to the warehouse and found themselves unable to make the necessary examination, they could have required the casks to be piled in a single tier, or they could have removed them. But sufficient has been said concerning the case presented by the evidence.

The vital question to be decided is, whether the law was correctly given to the jury in the instructions of the court. Generally, the instructions given were correct, but with regard to the duty of inspection for the discovery of leakage, we think the rule stated by the court was incorrect. One of the instructions was as follows: "The owner of liquids shipped or stored in barrels of any description is charged with the duty of supplying proper packages, especially where the liquid is volatile, such as spirits, and hard to contain or confine in receptacles, and the warehouseman is not responsible for damages arising from any inherent defect in the barrels delivered to him for storage, nor is he responsible if the negligence of the owner occasioned or contributed to the loss. Therefore, if you shall find that the barrels from which the leakage of the spirits took place were of defective construction, and unsuited for storage of spirits, and that such defect occasioned or contributed to the loss of the spirits, then you will find for the defendant. If the plaintiff was negligent originally, or the cooperage origi-

nally defective, and the leakage resulting was discovered by the defendant, or could by ordinary care have been discovered, and could have been prevented or cured by defendant, upon such discovery, by the exercise of ordinary care, then the defendant was bound to use such ordinary care in the premises."

By the latter part of this instruction the jury were plainly told that even if the leakage was due to the original negligence of the plaintiffs in storing the spirits in leaky casks, the defendant ²⁶⁸ was nevertheless liable for the loss, if by the exercise of ordinary care the defendant could have discovered and cured the defect, or prevented the loss. In another instruction given at the request of plaintiffs the jury were told, "that if you find from the evidence that the loss of the spirits for which the plaintiffs claim damages in this action was due to leakage or shrinkage while said spirits were in the defendant's custody as a warehouseman, and if you should further find that the defendant could have prevented said leakage or shrinkage by the exercise of ordinary care, and that the defendant failed to exercise such ordinary care in the premises, and that the plaintiffs were damaged thereby, your verdict should be for the plaintiffs for the amount of damage."

And ordinary care was, by another instruction, defined to be that degree of care which a man of ordinary caution and prudence would manifest in looking to his own interests. In short, by the instructions given and refused, the case was left to the jury to be decided upon the proposition that the defendant was responsible for the loss if it had not exercised the same care in watching and guarding against leakage as the owners of the property should themselves have exercised if the goods had been in their own store, and the defendant was allowed no advantage whatever from its stipulation against loss from leakage.

This, we think, was error. In view of the contract, it was the duty of respondents, and not the duty of the appellant, to guard against latent defects in the casks, and against the effects of shrinkage. They knew, as well as the defendant, the danger of loss from these causes, and the means of guarding against it. The defendant had declined that risk, and it rested upon them to take the necessary precautions, in view of the danger.

The judgment and order of the superior court are reversed.

Temple, J., and Harrison, J., concurred.

McFARLAND, J., concurring. I concur in the judgment of reversal. I also concur in the opinion of the chief justice, except so far as it might be construed to intimate that the evidence showed any negligence whatever on the part of appellant. In my opinion, the respondents would not have been entitled to recover, under the contract, and upon the evidence, if the instructions had been entirely free from error.

Bailment.—The burden of proof as between bailor and bailee is as follows: The bailor must prove the fact of bailment; then the bailee must, if he wishes to exonerate himself from liability for loss, show the fact and manner of loss, and the bailor must assume the burden of establishing that the loss was due to the negligence of the bailee: *Lancaster Mills v. Merchants' etc. Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317. See, too, *Higman v. Camody*, 112 Ala. 267, 57 Am. St. Rep. 33, 20 South. 480. If the property is in the exclusive possession of the bailee, and is returned in a damaged condition, the injury being one that does not ordinarily occur without negligence, proof of these facts establishes a prima facie case against the bailee: *Hildebrand v. Carroll*, 106 Wis. 324, 80 Am. St. Rep. 29, 82 N. W. 145. Proof merely of loss is not sufficient, ordinarily, to place the bailee on his defense: *James v. Orrell*, 68 Ark. 284, 82 Am. St. Rep. 293, 57 S. W. 931. See, further, the extended note to *Schmidt v. Blood*, 24 Am. Dec. 150-152.

The Liability of Warehousemen in general is discussed in the monographic note to *Schmidt v. Blood*, 24 Am. Dec. 145-160. That a railroad company is liable, as warehousemen, for the loss of oil by leakage, see *Baltimore etc. R. R. Co. v. Schumacher*, 29 Md. 168, 96 Am. Dec. 510. A carrier of goods may limit his liability by special contract with the shipper: See the monographic note to *Kirby v. Western Union Tel. Co.*, 46 Am. St. Rep. 777-780. But such a contract is strictly construed and never enforced unless reasonable: *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348. And a carrier cannot contract from immunity from the consequences of his own negligence: *Steele v. Townsend*, 87 Ala. 247, 79 Am. Dec. 49.

LEWIS v. DUNNE.

[134 Cal. 291, 66 Pac. 478.]

CONSTITUTIONAL LAW—REVISION AND REPUBLICATION—CODE AMENDMENTS.—A statute which in its title purports to be an act to revise a code of civil procedure by amending certain sections, repealing others, and adding certain new sections, and the body of which sets out in full all the sections amended or added, but none other, violates the constitutional provision that no law shall be revised or amended by reference to its title, but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended. (p. 258.)

CONSTITUTIONAL LAW—STATUTE, REVISION OF, WHAT IS.—A statute is a revision if it amends four hundred sec-
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tions, repeals nearly one hundred, changes the number of other sections, and adds new sections, as well as changes certain titles and chapter headings of a pre-existing code, and hence the whole of such code must be republished and re-enacted at length. (pp. 258, 259.)

CONSTITUTIONAL LAW—CODE AMENDMENTS, SUBJECT OF, WHEN NOT SUFFICIENTLY EXPRESSED.—If the title of a statute is to the effect that it is to revise the code of civil procedure of a state by amending certain sections, repealing others, and adding certain new sections, such title expresses no subject whatever. (p. 259.)

CONSTITUTIONAL LAW—CODE AMENDMENTS, WHEN INVOLVE MORE THAN ONE SUBJECT.—A statute which amends more than four hundred sections of the Code of Civil Procedure, repeals others, and adds new sections necessarily embraces more than one subject, and is for that reason unconstitutional and void, if the constitution of the state requires each statute to embrace but one subject. (p. 261.)

W. B. Bosley, John S. Drum, J. R. Pringle, Stafford & Stafford, and D. C. Deasy, for the petitioner.

John S. Partridge, A. C. Freeman, George J. Denis, and W. C. Van Fleet, for the respondent.

291 McFARLAND, J. This is an original petition here for a writ of mandamus. An alternative writ was issued, and upon answer of respondent and argument of counsel the cause was submitted. Whether or not the writ should be made absolute depends upon the constitutionality of a certain act of the legislature approved March 8, 1901. If the act is constitutional, then the writ should be denied; if not, then it should issue. Several other cases involving the same questions have been submitted, and the decision in this case will be determinative of the others.

Petitioner contends that the act in question is void because violative of the following parts of section 24 of article 4 of the state constitution: "Every act shall embrace but one subject, which subject shall be expressed in its title. . . . No law shall **292** be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended."

The title of the act in question (Stats. 1901, p. 117) is as follows: "An act to revise the Code of Civil Procedure of the state of California, by amending certain sections, repealing others, and adding certain new sections."

The said Code of Civil Procedure was not "re-enacted and published at length as revised."

The first impression made upon the ordinary mind by a comparison of these constitutional provisions with the title and body of the act is, that in the latter there is a clear failure to comply with the former. It seems as though the mind of either layman or lawyer might accept with safety the construction which, at first blush at least, is so obvious, and we do not think that the reasoning of counsel for respondent, or authorities cited, overcome this obvious view, or rightly lead to an opposite conclusion.

1. Petitioner contends that both the title and the body of the act show that it was intended to be, and is, a revision of the code, and that therefore it is invalid, because the law revised was not "re-enacted and published at length as revised"; and we see no sufficient answer to this contention. It is said that the title does not express a revision, because the language used is, "to revise, by amending certain sections, repealing others, and adding certain new sections." But how could there be a revision of a sectionized code in any way other than by amending and repealing sections and adding new ones? With respect to this phase of the case, the words, "by amending," etc., are mere surplusage; the title would be substantially the same if the words "to revise" stood alone. And when we look at the body of the act we see clearly that it is a revision. It covers one hundred and fifty pages of the published statutes of 1901; it amends over four hundred sections; it repeals nearly one hundred sections; it changes the numbers of other sections; it adds a great many new sections; and it contains this clause, "Certain title and chapter headings of the said Code of Civil Procedure are hereby inserted, changed, and amended, as hereinafter provided," and then follow several pages of insertions, changes, and amendments of such headings. If this is not a revision, then it would be difficult to state what would constitute a revision. Moreover, prior legislation on the subject: ²⁹³ shows that the act in question was the natural result of a purpose to revise. The preamble to the act states that by a certain act a commission had been appointed "for the revision and reforming of the law," and, among other things, "of the Code of Civil Procedure"; and it recites, "That whereas said commission did theretofore, in pursuance of said act, file with the Secretary of State a report recommending, among other things, a revision of the Code of Civil Procedure; now, therefore, in view of said recommendation, for the purpose of revising said code, the people of the state . . . do enact as fol-

laws." In view of all these considerations, we are forced to the conclusion that the act is a revision, and void for want of re-enactment and publication at large of the revised law, as contended by petitioner.

2. But if the invalidity of the act for the reason above given could by any recondite, indirect, and abstruse reasoning be explained away, it is just as clear that the act is void for want of compliance with the other constitutional provisions, that "every act shall have but one subject, which subject shall be expressed in its title." It is apparent that the language of the title of the act in question, in and of itself, expresses no subject whatever. No one could tell from the title alone what subject of legislation was dealt with in the body of the act; such subject, so far as the title of the act informs us, might have been entirely different from anything to be found in the act itself. This, of course, would be admitted, except for the claim that although the title does not, as an independent instrument, express any subject, yet it does so by "reference."

It may be conceded that where the title of an act clearly expresses a definite subject, then the title of an act amendatory thereof may be helped out by reference to the title of the original act—the title of the original act, which does express a subject, being incorporated into and published as part of the title of the amendatory act. But, in the case at bar, how does the reference in the title help its failure to otherwise express the subject? The reference is, really, not to the title of any former act; it is merely to "the Code of Civil Procedure of the state of California." Now, what is the Code of Civil Procedure? It is merely a name given to a large part of the general laws of the state. The part of the great body of our laws which is to be found under that name is not confined to any particular subject or subjects, but includes substantive law, criminal law, ²⁹⁴ and legislation, that might be properly classed under any category whatever—as well as "civil procedure." Nearly all of our general laws are arranged, for convenience, under four main headings, or names—to wit, the Civil Code, the Code of Civil Procedure, the Penal Code, and the Political Code—but no one of these codes is complete in itself; legislation under either code is inseparably interwoven with legislation under the others; and legislation upon any imaginable subject would not be held invalid because found in any particular code. In *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 63 Pac. 170, it was contended that a certain

provision of law did not affect rights involved in a civil proceeding, because found in the Penal Code, but this court said: "The position is not tenable. We have here a code system which is, for convenience and partial classification, divided into four codes, to each of which a name is given; but they are inseparably interwoven, and no one of them is complete in itself, or absolutely confined to a particular subject. Therefore, clear enactments or substantive law establishing rights—like section 294—are not to be held inoperative because found in any particular code." It was also said in that case, touching the provision in the Penal Code for the recovery of certain expenses in a civil action: "It would hardly be contended that the provision about liability in a 'civil action' is inoperative because found in the Penal Code." How, then, can it be rightly said that a mere reference in the title of an act to the Code of Civil Procedure, or to any other code, expresses any subject? If so, what subject? If the reference had been merely to "civil procedure"—if it had been "an act concerning civil procedure"—it is doubtful if it would have been in accordance with the clear intent of the constitution as to one subject. There is no definition, in our laws, of "procedure," nor can any satisfactory definition of it be found in the general authorities. For instance, some authorities hold that the law of evidence is part of the law of procedure, and others that it is not; and assuming that the former authorities are correct, could it be safely said that "pleading"—which is certainly a part of procedure—and "evidence" are not two different subjects, within the meaning of the constitution? In all the books of the law, pleading and evidence are uniformly treated as two entirely distinct subjects. But, as before stated, the title merely refers ²⁹³ to one of our codes, and, considering the multifarious character of the codes, it expresses no subject whatever. It does not even refer to a single section which is to be amended or repealed; and as to the "new sections," it does not give the slightest intimation as to what they are to contain, or what subject they are to deal with. And, according to respondent's contention, these new sections need not deal with anything formerly in the code; in addition to being new sections, they could include new subjects. When we look into the body of the act, we see that it deals with a vast variety of subjects, many of which are totally distinct from each other; and many of them have no relation to civil procedure, while others are partly procedure and partly substantive law—declarations as to personal

and property rights. And as the body of the act embraces more than one subject, it is for that reason invalid; for there is no field here for the play of the principle that a provision, the subject of which is expressed in the title, may be good, although another, not so expressed, be bad, where the two are not inseparably connected; because it would be vain to inquire which of several subjects is expressed in a title which expresses no subject whatever.

We cannot agree with the contention of some of respondent's counsel—apparently to some extent countenanced by a few authorities—that the provision of the constitution in question can be entirely avoided by the simple device of putting into the title of an act words which denote a subject “broad” enough to cover everything. Under that view, the title, “An act concerning the laws of the state,” would be good, and the convention and people who framed and adopted the constitution would be convicted of the folly of elaborately constructing a grave constitutional limitation of legislative power upon a most important subject, which the legislature could at once circumvent by a mere verbal trick. The word “subject” is used in the constitution in its ordinary sense; and when it says that an act shall embrace but “one subject,” it necessarily implies—what everybody knows—that there are numerous subjects of legislation, and declares that only one of these subjects shall be embraced in any one act. All subjects cannot be conjured into one subject by the mere magic of a word in a title. As to this point, the supreme court of New Jersey, in *Rader v. Township of Union*, 39 N. J. L. 515, well says: “It is true that it may be difficult to indicate by a formula how specialized the title of a statute must be; but it is not difficult to conclude that it must mean something in the way of being a notice of what is doing. Unless it does this, it can answer no useful end. It is not enough that it embraces the legislative purpose—it must express it; and where the title is too general, it will accomplish the former, but not the latter. Thus a law entitled ‘An act for a certain purpose’ would embrace any subject, but would express none; and consequently it would not stand the constitutional test.” There is a good deal of discussion, in the briefs, of the supposed reasons for the constitutional provision in question—the evils which it was intended to remedy, etc.—but whatever considerations led up to its adoption, it is clear that its direct and immediate purpose was, that the title should, on its face, give at least some sort of information as

to what the proposed act was about. This the title in question does not do.

We do not deem it necessary to notice in detail the authorities cited by counsel. As to those from other jurisdictions cited by counsel for respondent, it is to be observed that they were decided under state constitutions in which there was no such provision as that contained in section 22 of article 1 of the present constitution of California adopted in 1879, namely: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." The constitution of this state of 1849 had a provision as to the title and subject of acts similar to said section 24 of article 4, but from an early date it was construed to be merely directory: *Washington v. Page*, 4 Cal. 388; and the purpose of said section 22 of article 1 was evidently to prevent such construction in the future. The declaration that all the provisions of the constitution are mandatory and prohibitory "applies to all sections alike": *Ewing v. Oroville Min. Co.*, 56 Cal. 654, 655. The distinction between a constitution which contains this provision and those which do not is noticed by Mr. Justice Ross, in delivering the opinion of the court in *Earle v. San Francisco Board of Education*, 55 Cal. 491. After referring to the contention that the question there involved had been decided in a certain way in other states, he says: "It is true that it has been so decided, but under constitutions not containing a declaration that its provisions are 'mandatory and prohibitory, unless by express words they are declared to be otherwise,' as does the present constitution of this state." And in ²⁹⁷ connection with the claim that the section of the constitution involved in this case should be liberally construed—and it certainly should be construed with reasonable liberality—it is well to quote these other words of the opinion in the same case: "To maintain the constitution as it is, is our first duty, and whenever it is encroached upon, we are bound to maintain its supremacy." In many of the state constitutions the clause concerning the title and subject of statutes differs materially from section 24 of article 4 of our constitution. And in most of the cases cited by respondent from other states the title sustained referred, at least, to one subject, although the subject was somewhat general. The most extreme cases were those where the title was to establish a particular kind of code relating to one general subject—as, for instance, "An act to establish a probate code." Whether or not an act "to estab-

lish a code of civil procedure"—and confined in its body to civil procedure alone—could be validly passed under our present constitution, is a question not here before us. The question in the case at bar is, whether or not the title of an act passed under the present constitution, which merely refers to a part of the body of the general laws of the state, that is not confined to any subject whatever, expresses the subject of the proposed act, within the meaning of the constitution.

But the authorities in other states, and under constitutions which do not contain the mandatory and prohibitory provisions, are not, by any means, uniform on this question. For instance, in *People v. Hills*, 35 N. Y. 449, the question was, whether the title, "An act to amend chapter 389 of the laws of 1851," was valid, under a constitutional provision that no private or local bill "shall embrace more than one subject, and that shall be expressed in the title," and it was held that it was not. The court said: "The provision of the constitution of this state in reference to this matter is very plain and simple, and easily understood." The "chapter" mentioned in the title contained two hundred and ninety-three sections, and the body of the act showed that its purpose was to make an important amendment to section 290, and the court said: "The act under consideration does not indicate from its title what particular part of the section of the act of 1851 is amended, or any reference or indication of the subject matter of the amendment." The court further said: "The next inquiry is, Is the substance of this act expressed in the title thereof? The statement of the question, and a reference ²⁹⁸ to the title, provide a conclusive answer. . . . From its title it might as well be supposed to refer to any one of the numerous topics embraced in the two hundred and ninety-three sections of chapter 389 of the laws of 1851 as to the matter covered by the two hundred and ninetieth section of that act. . . . To sanction such a procedure would be to override and nullify a plain, clear, and mandatory provision of the constitution." And then follows language quoted from a former opinion, as follows: "Nothing can be more dangerous to our free institutions, or to the rights of the people, than to encourage doubtful interpretation of the constitution, contrary to its more plain and natural import, as understood by the great body of the people. . . . It is very clear, to my mind, that the subject of this act is not expressed in its title, and it must therefore fall under the condemnation of this section of the

constitution": See, also, *People v. Supervisors*, 43 N. Y. 10; *People v. Denahy*, 20 Mich. 349; *Davis v. Fulton*, 31 Ga. 69; *Brooks v. People*, 14 Colo. 413, 24 Pac. 553; *Rader v. Township of Union*, 39 N. J. L. 516; *Tingue v. Village of Port Chester*, 101 N. Y. 303, 4 N. E. 625; *Trumble v. Trumble*, 37 Neb. 341, 55 N. W. 869; *State v. Scholl*, 58 Kan. 507, 49 Pac. 668; *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100; *Kedzie v. Ewington*, 54 Minn. 117, 55 N. W. 864.

The decisions in California on this subject are not directly determinative of the question presented in the case at bar. The sufficiency of such a title as is here involved has never been presented to this court. *People v. Parvin*, 74 Cal. 549, 16 Pac. 490, is the only case here that can be at all insisted upon as supporting the respondent's contention. The title under consideration there was this: "An act to amend section 3481 of the Political Code." It referred to one single section, and named it. The almost universal custom of the legislature, in the numerous amendments which it has made to the codes, has been to put into the title of the amendatory act, after the number of the section, additional words expressing the subject of the act—as, for instance, "relating to the writ of prohibition," "relating to the lien of mechanics and others," etc. In a very few instances—not more than two or three having been called to our attention—the additional explanatory words have been omitted, and one of these was involved in *People v. Parvin*, 74 Cal. 549, 16 Pac. 490. A bare majority of the court, two justices dissenting and one not participating, held that the title was sufficient; but if we accept the decision as sound, it goes no further than to hold that the title of an act amending a single ²⁹⁹ section of a code is sufficient, if it directly refers to the section and designates it by its number. It is not an authority for the sufficiency of such a title as is here involved, which refers to no section whatever, and it cannot be considered as determinative of the question involved here, which was not before the court in the facts of that case. On the other hand, in the opinions rendered in the following cases, although the cases themselves are not directly in point, the reasoning by which certain titles were held to be bad, and others good, points to the insufficiency of the title involved in the case at bar: *People v. Parks*, 58 Cal. 624; *Ex parte Liddell*, 93 Cal. 638, 29 Pac. 251; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; *People v. Mullender*, 132 Cal. 217, 64 Pac. 299.

Complaint is made that the rule as above stated would put the legislature to great inconvenience when it desired to make a great many amendments or indulge in a great deal of legislation at one session or at one time. That consideration could not, under any circumstances, destroy a constitutional provision. But, without impugning the wisdom of any provision of the act before us, it is quite apparent that the very purpose of the constitutional provision in question is to prevent the evils which might come from hasty, inconsiderate, or wholesale legislation. Statutes which cannot be enacted in the manner prescribed by the constitution should not be attempted. A scarcity of statutory laws, and want of facility for passing them, are not among the evils of the times.

Our conclusion is, that, for the reasons above stated, the said act of March 8, 1901, is unconstitutional, and void for all purposes, and is inoperative to change or in any way affect the law of the state as it stood immediately before the approval of said act.

Let the alternative writ be made absolute.

Henshaw, J., Van Dyke, J., Temple, J., Harrison, J., and Garoutte, J., concurred.

BEATTY, C. J., concurring. I concur in the judgment, on the ground first discussed in the opinion of Justice McFarland. The act of 1901 is certainly a revision of the Code of Civil Procedure, and, as such, required to be re-enacted and republished at length, in order to satisfy the mandate of the constitution, but, in my opinion, it does not embrace more than one subject, and that subject is clearly expressed in its title.

⁸⁰⁰ The rules of procedure in civil cases constitute but a single and well-defined subject, and our present code, as adopted in 1872, with its subsequent amendments, embraces but few provisions not strictly germane to that subject. If it had been enacted since the adoption of our present constitution, it would have been entirely valid, except as to those few provisions. But it was valid in all particulars at the time of its enactment, and was not invalidated by the adoption of the new constitution, even as to such of its provisions as did not relate to the procedure in civil cases. The code itself therefore became and remains a subject, and a single subject, of legislation. An act to amend it or revise it deals with a single subject, and the title of such an act expresses the subject when it announces the purpose of the legislature to amend or revise the code. The authorities cited in the briefs of counsel

fully sustain the proposition that an act entitled an act to amend any valid existing statute described by its title is sufficiently descriptive of the subject, and of the whole subject, embraced in such statute.

But conceding that an act to revise or amend our existing code would be invalid as to any particular provisions not germane to the subject of procedure in civil cases, the act would be in other respects free from objection; and no provisions of the act of 1901 have been called to our attention which deal with other subjects, and certainly the particular provision here in question does not.

For these reasons, thus briefly indicated, I dissent from the views of the^{at} court respecting the second objection to the act.

Rehearing denied.

CONSTITUTIONALITY OF CODE AMENDMENT OR REVISION.

- I. Reference to Previous Note.
- II. The "First Impression" Notion.
- III. Amendatory Statutes Need Only Refer to the Original.
- IV. Amendments, Scope of.
- V. Illustrations of Titles of Amendatory General Statutes.
- VI. Reference to a Code by Its Name or Title.
- VII. Does the Name of a Code Sufficiently Express Its Subject.
- VIII. Broadness of Title.
- IX. Titles of Statutes Need not Disclose Details.
- X. Mandatory Constitutions.
- XI. Codes and General Statutes—Illustrations of Sustainable Titles.
- XII. Does Systematic Amendment Amount to Forbidden Revision.

I. Reference to Previous Note.—In our note to *Crookson v. County Commrs.*, 79 Am. St. Rep. 456, we discussed the questions involved in the principal case, and reached a conclusion at war with that announced with undoubting confidence by the supreme court of California. We must, of course, concede to the judgment of that court the weight due to judicial authority. We still feel confident, however, that it is not sustainable upon principle, and is, if possible, less defensible in the light of precedents previously existing. If the view of the court is well founded, then any systematic amendment either of the codes of any general statute of a state, or any authorized compilation of its general laws, must be impossible, if its constitution, with reference to the enactment or amendment of laws, conforms substantially to the constitution of California,

and we think such to be the case in a majority of the states of the Union. We should, however, not again enter into the discussion of this question, notwithstanding its paramount importance, were it not for certain expressions in the opinion in the principal case which we deem to be unfair, even to the extent, in some instances, of misrepresentation, and which we think, therefore, should not stand unchallenged lest those who have not had time to investigate may come to suppose them to be true.

II. The "First Impression" Notion.—Perhaps too much reliance was placed by the court on what it styles "the first impression of the ordinary mind," and to its suggestion that "it seems as though the mind of either layman or lawyer might accept with safety the construction which, at first blush, is so obvious." In truth, though the court was justified in speaking for itself, we are inclined to the opinion that it did injustice to the "layman" and to the "ordinary mind" in the views attributed to him and it. But the question was one which ought not to have been decided at "first blush" or by the "first impression made upon the ordinary mind," first, because it was worthy of mature and serious consideration, and second, because it was a constitutional question involving the construction of provisions adopted substantially from the constitutions of other states, where they had received judicial construction, and so far as such construction had preceded the adoption of the constitution of California, as in Alabama in 1866, Iowa in 1867, and Texas in 1854 (*Ex parte Pollard*, 40 Ala. 98; *Porter v. Thomson*, 22 Iowa, 391; *Murphy v. Menard*, 11 Tex. 673), it should doubtless have been held to have been adopted as a part of that constitution: *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194, 52 N. E. 346; *Laporte v. Gamewell etc. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 588; *Rouse v. Donovan*, 104 Mich. 234, 53 Am. St. Rep. 462, 62 N. W. 359; *State v. Chandler*, 132 Mo. 155, 53 Am. St. Rep. 483, 33 S. W. 797.

III. Amendatory Statutes Need Only Refer to the Original.—The title of the act which was overthrown by the decision in the principal case could not have been freed from objection by specifying therein each section amended, repealed, or added, because if it were necessary to so specify them, such necessity must have arisen from their containing several distinct subjects, and if a statute contains two or more subjects, it cannot be relieved from objection by specifying them, for, by the constitution, each statute must contain but one subject. Furthermore, in an amendatory or supplemental act there is no doubt that its title is sufficient if it refers to the act supplemented or amended: *Thomas v. State*, 124 Ala. 48, 27 South. 315; *Bagwell v. Lawrenceville*, 94 Ga. 654, 21 S. E. 903; *Brandon v. State*, 16 Ind. 197; *Greencastle etc. Co. v. State*, 28 Ind. 382; *Willis v. Mabon*, 48 Minn. 141, 31 Am. St. Rep. 626, 50 N. W. 1110; *Dyker etc. Co. v. Cooke*, 8 App. Div. 164, 38 N. Y. Supp. 222; *David v. Portland etc. Co.*, 14 Or. 98, 12 Pac. 174; *Commonwealth v. Morgan*,

178 Pa. St. 198, 35 Atl. 580. As was said in the last-named case: "It is not important that the title of an amendatory act shall do more than recite the title or substance of the act amended, provided the amendment is germane to the subject of the original act and is embraced within the title of such amended act. In other words, if the title of the original act is sufficient to embrace the matter covered by the amendment, it is unnecessary that the title of the amendatory act should of itself be sufficient."

IV. **Amendments, Scope of.**—Code legislation, if possible and proper, must be subject to amendment to the same extent and in the same manner as any other general law, and the amendment may be restrictive, or, like the original statute, general. The title of an amendatory statute may be limited to some particular portion of the act or code proposed to be amended, and in that event, as the title is restrictive, the subject matter of the act cannot extend beyond it. If, however, the title is not restrictive, the amendatory legislation may include any matter which might have been inserted in the original act or code when it was adopted. With respect to statutes other than codes, however comprehensive their subjects, we believe there has been no dissent from the proposition that the only title required of an amendatory statute is one stating that it is to amend the original statute, giving such a description thereof that there can be no difficulty in the identification: *American S. Co. v. Great W. S. Co.*, 58 N. J. Eq. 526, 43 Atl. 579; *Schmalz v. Woolley*, 57 N. J. Eq. 303, 73 Am. St. Rep. 637, 41 Atl. 939; *In re Pottstown Borough*, 117 Pa. St. 538, 12 Atl. 573; *Scranton etc. Co. v. Northern Coal etc. Co.*, 192 Pa. St. 97, 43 Atl. 470; *Commonwealth v. Dickert*, 195 Pa. St. 234, 45 Atl. 1058. So, if an act is both amendatory and supplemental, its title need only so declare. Hence, an act entitled, "An act amendatory of, and supplemental to, chapter 50 of the Compiled Statutes of 1885, entitled 'Liquors,'" sufficiently states its subject in such title: *In re White*, 33 Neb. 812, 51 N. W. 287.

V. **As Illustrations of Titles of Amendatory General Statutes** adjudged to be proper and sufficient, we refer to the following: "An act to amend an act to regulate the trials of misdemeanors in Sumter county, approved December 8, 1882": *Lewis v. State*, 123 Ala. 84, 26 South. 516; "To amend an act entitled 'An act to more effectually secure competent and well-qualified jurors in the county of Montgomery,' approved February 21, 1887": *Thomas v. State*, 124 Ala. 48, 27 South. 315; "An act to amend an act entitled 'An act to create a commissioner of public works, defining his duties and powers, prescribing his compensation, and making appropriation,' approved March 24, 1893, relating to the office of commissioner of public works": *Leake v. Colgan*, 125 Cal. 414, 58 Pac. 69; "An act to amend an act entitled 'An act to establish the municipality of Jacksonville, provide for its government, and prescribe its jurisdiction and powers,' approved May 31, 1887": *State v. Commrs. of Duval County*,

23 Fla. 505, 3 South. 193; "An act to amend an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state, approved February 4, 1868"; "An act to amend an act entitled 'An act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in the state,' approved February 4, 1869, and the acts amendatory thereof, and to further provide for the organization and government of cities": *Saunders v. Pensacola*, 24 Fla. 234, 4 South. 801; "An act to amend the several acts incorporating the town of Lawrenceville": *Bagwell v. Lawrenceville*, 94 Ga. 654, 21 S. E. 903; "An act to amend the act to incorporate the city of Muscatine": *Morford v. Unger*, 8 Iowa, 82; "An act to amend the charter of the city of Augusta in Bracken county": *Board of Trustees of Augusta v. Maysville*, 97 Ky. 145, 30 S. W. 1; "An act to amend an act entitled 'An act to prevent debtors from giving a preference to creditors, and to secure the equal distribution of property of debtors among their creditors, and for the release of debts against creditors'": *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626, 50 N. W. 1110; "An act to amend 'An act to enable the city of St. Louis to procure a supply of wholesome water'": *City of St. Louis v. Tiefel*, 42 Mo. 590; "An act to revise and amend chapters 176-186, inclusive, regulating the jurisdiction and procedure before justices of the peace in civil cases": *State v. Ranson*, 73 Mo. 84; "An act to amend the several acts in relation to the city of Rochester": *People v. Riggs*, 50 N. Y. 553; "An act to amend the title of, and to amend an act entitled, 'An act,' etc., passed May 24, 1878": *Dyker etc. Co. v. Cooke*, 3 App. Div. 164, 38 N. Y. Supp. 222; "An act to amend an act entitled 'An act to incorporate the city of Portland'": *David v. Portland etc. Co.*, 14 Or. 98, 12 Pac. 174; "An act to amend chapter 170 of the private laws of 1857, entitled 'An act to incorporate the Yellow River Improvement Company'": *Yellow River etc. Co. v. Arnold*, 46 Wis. 221, 49 N. W. 971; "An act to amend an act entitled 'An act to regulate and tax foreign insurance or express corporations or associations doing business in this state'": *Northern P. E. Co. v. Metschan*, 90 Fed. 80; "An act to amend an act of the extraordinary session of 1885, passed June 11, and approved June 12, 1885, entitled 'An act to divide the state of Tennessee into judicial circuits and chancery divisions, and provide for the administration of justice and equity in circuit, and chancery and other inferior courts of this state, and to fix the time for holding said chancery, circuit, and other courts'": *State v. Algood*, 87 Tenn. 163, 10 S. W. 310. In this last case the court said: "The criticism is that this title does not indicate the character of the proposed amendment. This is not necessary, if, in fact, the amendment is germane to the original act and is embraced within the title of the original or amended act. In such case, the title of the amended

act being made a part of the title of the amendatory act, the particulars of the amendment need not be shown by the title." So in the case already cited from 24 Florida, the court, at page 235, said: "Where the title of the amending act sets out the title of the act to be amended, as does this, and the title sufficiently states the subject of the act to be amended, and the body of the amendatory act states, as does this, for what section of the act amended any of its own sections may be the amendment and substitute, there is a sufficient compliance with section 14, article 4 of the constitution of 1868, providing that the 'subject' of each law 'shall be briefly expressed in the title, and no law shall be amended or revised by reference to its title only, but in such case the act as revised or section as amended shall be re-enacted and published at length.' In so far as affecting the twenty-ninth section of the original act of 1869, as amended by the act of March 2, 1877, chapter 3025, the title of the act of 1879, chapter 3163, would have been sufficient had it been merely entitled 'An act to amend the statute of 1869.' referring to it by its title and date of approval, as it does."

VI. Reference to a Code by Its Name or Title.—In this connection it should be remembered that the code was unquestionably constitutional when enacted, and that by section 19 thereof it, "whenever cited, enumerated, referred to, or amended, may be designated simply as the Code of Civil Procedure." The amendatory statute, therefore, complied with the act itself, and left no doubt of the statute to be amended. It is said to be doubtful whether the subject of evidence is properly included in a code of procedure. To this it may be answered: (1) If it is not properly included, then the code is unconstitutional and inoperative only in so far as it seeks to include it; (2) that long before the adoption of the present constitution a code of civil procedure had been enacted and in force in which this subject was treated, that in this respect the code followed the precedent established in New York and in other states, and that the term "civil procedure" had thus been given a practical construction with which the public was familiar; and that (3) mere doubts are always resolved in favor of the constitutionality of a statute, and this rule applies when it is assailed because of its title as well as when the assault is on some other ground: *Ex parte Mayor of Birmingham*, 116 Ala. 189, 22 South. 454; *Ex parte Liddell*, 93 Cal. 638, 29 Pac. 251; *County Commrs. of Duval County v. Jacksonville*, 36 Fla. 196, 18 South. 339; *Larned v. Tiernan*, 110 Ill. 173; *McAunich v. Mississippi etc. R. Co.*, 20 Iowa, 342; *Woodruff v. Baldwin*, 23 Kan. 493; *Johnson v. Harrison*, 47 Minn. 577, 28 Am. St. Rep. 382, 50 N. W. 923; *State v. Tibbetts*, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990.

VII. Does the Name of a Code Sufficiently Express Its Subject.—

The court, in the principal case, apparently accepting as correct the general view respecting the title of amendatory statutes, held, properly enough, that this rule could not be applicable if the title of the original statute did not of itself state any subject, and further asserted that the title "The Code of Civil Procedure of the State of California" being "merely a name given to a large part of the general laws of a state," did not sufficiently express the subject. If it be true that the term "Code of Civil Procedure" did not sufficiently express the subject of a statute, the like inadequacy must be affirmed of the terms "Penal," "Civil," and "Political Code," and of every other term which may be employed to designate any other considerable code of general laws, and the adoption either of codes or of revised or compiled statutes must be constitutionally impossible in any state whose constitution requires each statute to embrace but one subject, which must be expressed in its title. Such, we think, from the language employed in the principal case, must be the opinion of the members of the supreme court of California, but the question of the power of the legislature under similar constitutional provisions to adopt a code of civil procedure, or penal code, or the like, or even to enact a complete code containing all the general legislation of the state, has been repeatedly passed on by the courts of other states, and in every case it has been held that such an act contains but one subject, which is sufficiently expressed by such a title, and is therefore valid: *Ex parte Thomas*, 113 Ala. 1, 21 South. 369 ("An act to adopt a code of laws for the state of Alabama"); *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773 ("Criminal Code"); *Mathis v. State*, 31 Fla. 291, 12 South. 681 ("An act to enact the Revised Statutes of the state of Florida, and to provide for the printing, sale, and distribution thereof"); *Central etc. R. Co. v. State*, 104 Ga. 831, 31 S. E. 531 ("An act to approve, adopt, and make of force the code of laws prepared under the direction and authority of the general assembly"); *Porter v. Thomson*, 22 Iowa, 391 ("The Code of Civil Practice"); *Woodruff v. Baldwin*, 23 Kan. 491 ("An act to establish a code of criminal procedure"); *Johnson v. Harrison*, 47 Minn. 575, 28 Am. St. Rep. 382, 50 N. W. 923 ("An act to establish a probate code"); *State v. Brassfield*, 81 Mo. 151, 51 Am. Rep. 234 ("Crimes and Criminal Procedure"); *Tribune Co. v. Barnes*, 7 N. Dak. 591, 75 N. W. 904 ("The Political Code"); *Murphey v. Menard*, 11 Tex. 673 ("An act to regulate proceedings in the county court pertaining to the estates of deceased persons"); *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520 ("The Code of 1881").

VIII. Broadness of Title.—In the principal case it is said that "we cannot agree with the contention of some of respondent's counsel—apparently to some extent countenanced by a few authorities—that the provision of the constitution in question can be en-

tirely avoided by the simple device of putting in the title of an act words which denote a subject 'broad' enough to cover everything." Of course, the constitution of a state should not be avoided, but it should always be construed in the light of similar provisions in pre-existing constitutions and the decisions thereunder, and, furthermore, should be considered in connection with the evils attempted to be guarded against. It would be somewhat dangerous to affirm respecting any great question that there is no conflict of opinion or authority. Nevertheless, we are inclined to declare that we believe that there is no decision of any court of last resort, unless it be in the principal case, which indicates that a title, however broad, will fail to support any legislative action included within it, or germane to it, or necessary to its accomplishment. This is one of the points with respect to which we are inclined to characterize the opinion in the principal case as partisan and unfair, for the reason that whoever reads it must necessarily be led to the impression that the position of counsel spoken of in the opinion was one which, if sustained at all, was sustained by comparatively few authorities, whereas we believe we may safely challenge the production of any authority in opposition to it, unless it be the opinion in the principal case. How was it possible for the court to characterize the authorities in support of it as "few" after viewing, as it must have done in the performance of its duties, the following? *Dew v. Cunningham*, 28 Ala. 466, 65 Am. Dec. 362; *Ex parte Pollard*, 40 Ala. 98; *Hoover v. State*, 50 Ala. 57; *Bales v. State*, 63 Ala. 30; *City Council v. National Assn.*, 108 Ala. 836, 18 South. 816; *Ex parte Birmingham*, 116 Ala. 186, 22 South. 454; *Ex parte Thomas*, 113 Ala. 1, 21 South. 869; *State v. Sloan*, 66 Ark. 575, 74 Am. St. Rep. 106, 53 S. W. 47; *Ex parte Kohler*, 74 Cal. 38, 15 Pac. 436; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86; *Los Angeles Co. v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217, 59 Pac. 202; *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773; *Ludington v. Hellman*, 9 Colo. App. 548, 49 Pac. 377; *Mathis v. State*, 31 Fla. 291, 12 South. 681; *Mayor v. State*, 4 Ga. 38; *Howell v. State*, 71 Ga. 227, 51 Am. Rep. 259; *McCommons v. English*, 100 Ga. 653, 28 S. E. 386; *Central etc. R. R. Co. v. State*, 104 Ga. 831, 31 S. E. 531; *Larned v. Tiernan*, 110 Ill. 173; *People v. Nelson*, 133 Ill. 565, 27 N. E. 217; *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277, 45 N. E. 830; *West Chicago v. Sweet*, 167 Ill. 326, 47 N. E. 728; *Park v. Modern Workmen*, 181 Ill. 214, 54 N. E. 932; *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582; *Chicago etc. R. R. Co. v. State*, 153 Ind. 184, 51 N. E. 924; *Porter v. Thomson*, 22 Iowa, 391; *Woodruff v. Baldwin*, 23 Kan. 491; *In re Sanders*, 53 Kan. 191, 36 Pac. 348; *State v. Owens*, 9 Kan. App. 595, 58 Pac. 240; *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788; *Lien v. County Commrs.*, 80 Minn. 64, 82 N. W. 1094; *Crookston v. County Commrs.*, 79 Minn.

286, 79 Am. St. Rep. 455, 82 N. W. 588; *State v. Bockstruck*, 136 Mo. 365, 38 S. W. 317; *State v. Brassfield*, 81 Mo. 151, 51 Am. Rep. 234; *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365; *Kansas etc. Co. v. Frey*, 30 Neb. 790, 47 N. W. 87; *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990; *Newark v. Mt. Pleasant Co.*, 58 N. J. L. 171, 33 Atl. 396; *Tribune Co. v. Barnes*, 7 N. Dak. 591, 75 N. W. 904; *Ex parte Mon Luck*, 29 Or. 421, 54 Am. St. Rep. 804, 44 Pac. 693; *Pinkerton v. Pennsylvania T. Co.*, 193 Pa. St. 229, 44 Atl. 284; *State v. Brown*, 103 Tenn. 449, 53 S. W. 727; *State v. Schlitz*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; *Murphey v. Menard*, 11 Tex. 673; *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711; *Prison Assn. v. Ashby*, 93 Va. 667, 25 S. E. 893; *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *State v. Mines*, 38 W. Va. 139, 18 S. E. 470.

IX. Titles of Statutes Need not Disclose Details.—Respecting the suggestion that the title did not show what the amendatory sections contained or with what subjects they dealt, the reply may be made that details need not be mentioned in the title of a statute: *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86. Nor need the title be in the nature of an index. It is sufficient if sufficiently comprehensive, when liberally construed, to give warning that the matters included in the statute may be the subject of legislative consideration therein. "The constitution is obeyed if all the provisions relate to the one subject indicated in the title and are parts of it, or incident to it, or reasonably connected with it, or are in some sense auxiliary to the object in view. It is not required that the subject of the bill shall be specifically and exactly expressed in the title, or that the title shall be an index of the details of the act. Where there is doubt as to whether the subject is clearly expressed in the title, the doubt shall be resolved in favor of the validity of the act": *Bobel v. People*, 173 Ill. 25, 64 Am. St. Rep. 64, 50 N. E. 322; *People v. Superior Court*, 100 Cal. 120, 34 Pac. 492; *County Commrs. of Duval Co. v. Jacksonville*, 36 Fla. 196, 18 South. 339; *Borough of Millvale v. Evergreen R. R. Co.*, 131 Pa. St. 1, 18 Atl. 993; *Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484, 24 Am. St. Rep. 512, 21 Atl. 982. "It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents": *Abeel v. Clark*, 84 Cal. 229, 24 Pac. 383.

X. Mandatory Constitutions.—The other point in the opinion in the principal case which we characterize as a misrepresentation is that the decisions cited to the court were pronounced "under state constitutions in which there was no such provision as that contained in section 22 of article 1 of the present constitution of California, adopted in 1879—namely, 'the provisions of this constitution are mandatory and prohibitive, unless by express words they are declared to be otherwise.'" It should be remembered: 1. That the rule formerly prevailing in California, that the constitution may be regarded as directory, is contrary to the de-

cided weight of authority, that Judge Cooley speaks of it as prevailing in two or three states (Cooley's Constitutional Limitations, sec. 179), and hence that we cannot assume it to have prevailed, or to have influenced the decision of the court, unless it professed to act upon that ground; 2. That the courts in the opinions heretofore cited all rested their conclusions on the ground that the titles involved were sufficient, and none on the ground that the constitutional provisions in question were directory merely; 3. That in many of the states the courts have, in the opinions thus cited, expressly admitted that the constitutional provisions upon the subject were mandatory: *Weaver v. Lapsley*, 43 Ala. 224; *Edwards v. Denver etc. R. R. Co.*, 13 Colo. 67, 21 Pac. 1011; *Mathis v. State*, 31 Fla. 301, 12 South. 681; *Prothro v. Orr*, 12 Ga. 36; *Supervisors v. Heenan*, 2 Minn. 330; *Johnson v. Harrison*, 47 Minn. 577, 28 Am. St. Rep. 382, 50 N. W. 923; *State v. Miller*, 45 Mo. 495; *State v. Tibbets*, 52 Neb. 232, 66 Am. St. Rep. 492, 71 N. W. 990; *Union Pac. Co.'s Appeal*, 81½ Pa. St. 91; *Cannon v. Mathes*, 8 Heisk. 504; *Cannon v. Hemphill*, 7 Tex. 184; *San Antonio v. Gould*, 34 Tex. 49; while the constitution of North Dakota contains the identical provision to be found in that of California (N. Dak. Const., art. 1, sec. 21), and that of Washington declares that "all the provisions of this constitution are mandatory, unless by express words they are declared to be otherwise": Wash. Const., art. 1, sec. 29.

XI. Codes and General Statutes—Illustrations of Sustainable Titles.—It is claimed in the opinion in the principal case that the most extreme of the cases cited is one sustaining "An act to establish a probate code," and that such an act, though very general, at least refers to one subject and is more defensible than "An act to establish a code of civil procedure." Again, a misrepresentation is made for which we know not how to account, except upon the assumption that the court refused to inform itself upon the subject of which it spoke, or, being informed, chose to minimize the truth. As neither assumption can be entertained, the problem must be left unsolved. The statute sustained in Florida was entitled "An act to enact the Revised Statutes of the state of Florida, and to provide for the printing, sale, and disposition thereof." It adopted, without republishing the report of the commissioners, and was sustained, though it was admitted that it was subject to all the provisions of the state constitution, except the one requiring reading at length on its final passage: *Mathis v. State*, 31 Fla. 301, 12 South. 681. So the statute sustained in Georgia was entitled "An act to approve, adopt, and make of force the code of laws prepared under the direction and by the authority of the general assembly": *Central etc. R. R. Co. v. State*, 104 Ga. 831, 31 South. 531. And that in Texas, "An act to adopt and establish the Revised Civil Statutes of the state of Texas": *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711. The statute sustained in Iowa as early as 1867 was entitled "A Code of Practice": *Porter v. Thompson*, 22

Iowa, 393. Notwithstanding the mandatory provisions in their constitutions, the courts of North Dakota and Washington upheld, the one, four complete codes entitled as are those in California, and the other the Code of 1881, consisting of a Code of Civil Procedure and a Penal Code: *Tribune Co. v. Barnes*, 7 N. Dak. 591, 75 N. W. 904; *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520.

Again, the court in the principal case, by the manner in which it cites *People v. Hills*, 85 N. Y. 449, would create the impression that the courts of that state had pronounced against amendments of the character here in question, whereas, as the court must have known but did not mention, the case cited by it was not in point, and was sufficiently explained in the subsequent case of *People v. Briggs*, 50 N. Y. 553; and the court chose to overlook *Heller v. People*, 2 Colo. App. 464, 31 Pac. 773, sustaining an act entitled "An act to amend chapter 24 of the General Laws of Colorado, entitled 'Criminal Code,'" and the only New York case precisely in point, viz., *People v. Durley*, 58 N. Y. 332, sustaining an act entitled "An act to amend the Code of Civil Procedure." In this case it appeared that the act relied upon had been superseded by an act entitled "An act to amend the Code of Civil Procedure," and to this it was responded that this amendatory act violated the provisions of the constitution of the state requiring private and local bills to contain but one subject, which must be expressed in the title. Upon this the court of appeals said: "I agree with the appellants' counsel that the provision in question is local, standing by itself. It relates exclusively to the officers and property in a definite local division of the state and to persons owning property there. The answer to the point, I think, is, that it is fairly embraced within the title. The Code of Procedure treats of the jurisdiction and practice of all the courts of the state, including the district courts of the city of New York. Among the courts specified are several local courts, besides the one in question, and the provisions relating to all those courts are but parts of a general judicial system of practice created by the code. An act to amend the code might, therefore, legitimately contain provisions relating to the jurisdiction or practice of any one or more of the courts of the state. Each provision cannot be regarded as an independent subject, but part of a general subject. The title, it is true, is quite general, but it is necessarily so from the nature of the subject."

XII. Does Systematic Amendment Amount to Forbidden Revision.—The other proposition affirmed by the opinion in the principal case is one not previously adjudicated and concerning which, we conceive, there may be reasonable doubt. It relates to the constitutional declaration that "no law shall be revised or amended by a reference to its title, but in such case the act revised or section amended shall be re-enacted and published at length as revised and amended." In some of the earlier constitutions the word "revived"

is employed in place of "revised," and why the latter word was substituted for the former we cannot comprehend. The only applicable definition of the word "revise" to be found in the Century Dictionary is: "To amend, bring into conformity with present needs and circumstances; reform, especially by public or official action." Within this definition every change in a pre-existing statute is, or at least may be, a revision. Though a single section is repealed or added, this change may have been the result of a most thorough consideration of the pre-existing statute; or, in other words, may be intended for, and amount to, its revision, and yet no one would contend that it necessitated the re-enactment or republication of the whole statute, nor do we conceive that the number of sections amended, repealed, or added can be accepted as a test of whether a statute has been revised or merely amended. If it were so accepted, what further test could be formulated and applied for the purpose of determining what is the number which signifies revision, and what amendment only?

There is not, so far as we are aware, any constitutional provision requiring a statute to be divided into sections or that any other mode of subdividing it be adopted, and perhaps it was for the purpose of making the rule applicable to unsectionized as well as to sectionized statutes that the language now to be found in many of the constitutions was adopted. There is no reason to believe that, as to sectionized statutes, it was ever contemplated that the sections left intact should be re-enacted or republished, or that the courts should be called upon to determine whether the legislative action with respect to sections amended, repealed, or added, and when repealed or added, set forth at length in the amendatory acts, was, in contemplation of the author or of the law, a revision or a series of amendments only.

The mischief intended to be avoided by the constitutional provisions here under consideration was the common practice, still followed by the Congress of the United States, of amending a statute merely by directing the insertion, omission, or substitution of certain words, or by making some different provision, and without setting out the law as intended to be so amended. The result was that no one, by reading the amendatory act by itself, could understand what was the law on the subject. That this was the only object of this provision of the constitution was held in *Fletcher v. Prather*, 102 Cal. 413, 418, 36 Pac. 658, where the court said: "In the absence of a constitutional provision of this character, a section of an act might be, and often was, amended in one or more of four ways: 1. By striking out certain words; 2. By striking out certain words and inserting others; 3. By inserting certain words; and 4. By adding other provisions. This mode of amendment did not repeal or disturb the existence of the parts of the original section not stricken out; but the objection to this mode of amendment was that it tended

to confusion and uncertainty, owing to the difficulty of correctly reading the original section with the amendments—a difficulty which largely increased with each subsequent amendment. This uncertainty not only affected those who were called upon to interpret statutes thus amended, but it begat uncertain and confused legislation, since every legislator, before he could intelligently vote upon proposed amendments, must first know with certainty how the section with all previous amendments read, and what it meant. So far as the original provisions of the section remained unchanged, they were in force from the date of the original enactment, and, so far as they were changed, the new or changed provisions took effect from the date of the amendment; so far as this is concerned, no reason for any change in the operation of an amended statute is suggested in the operation of the statute above quoted, nor is any reason for a change apparent. We therefore conclude that its whole purpose and effect is to avoid the evils resulting from the mode of amendment which might and did prevail in the absence of such provision.” Recent examples of such congressional legislation will illustrate this practice: 18 Stats. 5, enacted that a certain act be amended by adding to proviso 1, in the clause relating to public printing, the words “and the House of Representatives”; 18 Stats. 24, enacted that a certain act be amended “so as to authorize the secretary of the treasury to designate the months in which fur-seals may be taken for their skins,” etc.; 19 Stats. 240, amended the Revised Statutes as follows: “Section 192 is amended by inserting after the word ‘the’ in the second line, the word ‘Union.’” Then follow twenty-two amendments, in similar form, to other sections. The evil of such a practice is obvious; and it is equally obvious that that evil would have been entirely avoided, in every such case, if the particular portion of the act sought to be amended had been set out in full, as amended, in the amendatory act. In the last instance given above of the method pursued by Congress, for example, it would have been quite sufficient to have set out the particular sections so amended, and it would be absurd to require the amendatory act to also contain the thousands of sections not sought to be amended by it. Accordingly, the constitution of California requires that “the section amended” shall be re-enacted and published at length; and, if an amendatory act does so set out each section amended by it, it would seem plain that the constitution has been complied with, in letter and spirit. We submit that the true meaning of the provision in question is that, where one or more sections of an act are specifically amended, those sections must be set forth in full as amended; but that, where an act, not divided into sections, is revised (which merely means amended), or where, though it contains sections, it is revised as a whole, the entire act as revised must be set forth. This is the only reasonable construction of this

provision, and fully meets the evil intended to be cured; and it has been uniformly followed by the legislature.

If, however, the act in question in the principal case was a revision, still a saving construction was as open to the court as is the one which it adopted. The constitutional provision is that "No law shall be revised or amended by a reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." It is to be observed that this provision simply offers an alternative. The alternative is that wherever a law is revised or amended, one of two things may be done in the discretion of the legislature, viz., either the whole act or the sections which are changed shall be re-enacted and published. The language used clearly points to a discretion of the legislature in the matter. The provision says that whenever a "law" is amended or revised "the act revised or section amended shall be re-enacted and published," etc. This clearly means that either one of the things may be done—i. e., either the whole thing or the particular parts changed shall be re-enacted as the legislature may determine. The reason of the provision accords with this view. What sense is there in requiring several thousand sections to be re-enacted—reading them at length before each house on three successive occasions, and going to enormous expense in publishing them, when they are unaffected by the changes which are made in a few hundred sections? There may arise occasions when convenience requires the publication and re-enactment of the whole. There are certainly occasions when the publication and re-enactment of the parts affected is ample for every purpose. The legislature is the best judge of which course the public interest requires, and for that reason it is given the alternative of taking either course.

CRANES GULCH MINING COMPANY v. SCHERRER.

[134 Cal. 350, 66 Pac. 487.]

MINING CLAIMS—WHEN NOT SUBJECT TO THE ORIGINAL MINING ACT OF 1872.—If, under the "placer act" of Congress of July, 1870, location and payment were made and a certificate of purchase issued, the purchaser became entitled to a patent free of the reservations required to be inserted in patents by the "general mining act" of May, 1872, excluding vein or lode claims not included in the application for the patent. (p. 280.)

MINING CLAIMS.—ONE WHO HAS BECOME ENTITLED TO A PATENT, the issuing of which is delayed, is not by such delay subject to any diminution of his rights, nor to additional burdens or the assault of third persons. (p. 281.)

MINING CLAIMS—LODES, WHEN INCLUDED IN PATENT FOR PLACER MINES.—A patent issued for a placer mine

under the act of Congress of July, 1870, passes all lodes within the boundaries described in such patent, in the absence of a located lode within such boundary or of a contest. (p. 282.)

Tabor & Tabor and John M. Fulweiler, for the appellants.

Lindley & Eickhoff and Williams & Witmer, for the respondent.

351 TEMPLE, J. Action to quiet title to mining ground. Plaintiff claims under a patent for a placer mine, dated July 1, 1872. The defendants claim under a lode location made in 1897. Plaintiff's patent was based upon proceedings instituted May 9, 1871, and upon final entry and payment made February 14, 1872.

The rights of plaintiff had their inception under what is usually called the "placer act," dated July 9, 1870. This act, though not repealed, was amended by adding a reservation of known lodes, and in some other respects, by the act of May 10, 1872, sometimes called the "general mining act." In section 10 it was enacted that the placer act should continue in force, except as to the proceedings to obtain a patent, which, it was provided, "shall be similar to the proceedings prescribed by sections 6 and 7 of this act for obtaining patents to vein or lode claims." It was further enacted in the same section that all placer claims thereafter located should conform to legal subdivisions of public land surveys, "provided that proceedings now pending may be prosecuted to their final determination under existing laws; but the provisions of this act, when not in conflict with existing laws, shall apply to such cases."

Defendants claimed under a location made of a lode some twenty-six years after the issuance of the patent. It is contended that the lode was a known lode when the application **352** for the patent was made in 1871. The patent contained the usual reservation found in all patents issued under the act of 1872, of veins or lodes known to exist at its date, within the described premises. Defendants had no claim to the premises at the date of the passage of the act of 1872, or prior to 1897. It does not appear that there was any adverse claim to the placer location prior to that time.

Sections 6 and 7 contain rather elaborate provisions in regard to the application for a patent and for a contest. Section 11 provides for the case where a placer claim contains a lode within its boundaries. The placer claimant may purchase the lode if he chooses, but if a lode is known to exist within

the placer, "an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right to the vein or lode claim, but when the existence of a vein or a lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The first question of interest here is, Does section 11 apply to plaintiff's location, and does it authorize the reservation contained in the patent? It may be conceded that where no application for a patent had been made by a placer claimant, whose location and occupation were such that he could have inaugurated proceedings for a patent before the act of 1872 was passed, he would be compelled to proceed under section 11, and that the act made his patent subject to the conditions there expressed. Possibly, this would be true as to applications pending when the last act was passed, provided payment had not been made and a certificate issued, but to make it apply to a claim, when a certificate of purchase has been issued before the act of 1872 was passed, so as to include these reservations, would violate the provisions in section 16 of the act, "that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

Upon payment of the price, and its acceptance, the applicant becomes vested with a complete equitable title, and to a patent which will convey to him the legal title. He is the real owner of the mine. His right is complete; only the evidence of his right is withheld. It has been held: "When the ³⁵³ price is paid, the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the office causes delay. But such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast additional burdens upon the purchaser, or expose him to the assaults of third parties": *Benson Min. etc. Co. v. Alta Min. etc. Co.*, 145 U. S. 431, 12 Sup. Ct. Rep. 877. See, also, *Stark v. Starrs*, 6 Wall. 402, and *People v. Shearer*, 30 Cal. 645.

One of the contentions of appellants upon this point, if I rightly grasp it, is, that lodes did not pass by a patent issued for a placer claim under the act of 1870. This is based largely upon the language of section 12, as numbered in the amenda-

tory act: "Claims usually called 'placers,' including all forms of deposits, excepting veins of quartz and other rock in place, shall be subject to patent and entry under this act," etc.; and it is contended that it is to be construed as other sections of the act of which it is made a part had been construed. The act, it is contended, authorizes the sale to a lode claimant of one lode only. He gets no land, save such as is required for the convenient working of his lode. If another lode or a placer were found within land taken by a lode claimant under the act of 1866, of which the act of 1870 was amendatory, the lode claimant would have no right to the other lode, or to the placer. So here, it is said, the act of 1870 only authorized the sale of a placer claim. Without entering the land or getting a patent, the claimant could hold and work out his mine, but to hold it he was required to comply with certain burdensome conditions. The patent, it is argued, merely gave him title to his claim, and relieved him from the burdensome conditions. He then owned his claim, freed from the conditions and the liability to lose it by abandonment. But what he claimed was the right to mine that placer, and, in terms, the statute confines his patent to that. And this position is much strengthened by the rule of construction which requires all grants from the government to be construed favorably to the government and against the grantee.

Furthermore, it is said the same act provides for the purchase of a lode claim, and land necessary for its working, at the price of five dollars per acre, and it is provided that "no patent issue for more than one vein or lode, which shall be expressed in the patent issued." It is strongly urged that Congress ³⁵⁴ could not have intended, while so carefully providing that no one person should be permitted to purchase more than one lode, to permit, in another section of the same statute, anyone to purchase a tract of land, which may include many lodes, at one-half the price per acre charged for lode claims.

All this is very plausible and persuasive, but the statute clearly authorizes the sale of placer lands in tracts not to exceed one hundred and sixty acres, and that such tract shall conform to the system of public surveys. No provision is made for any reserved right in the government, or for the disposition of the land subject to the rights of the placer claimant. The lode claimant gets a complete title to the lands within his patent, subject only to the express reservation, which the law di-

rects should be contained in the patent. No reason appears why a placer patent shall not be construed in the same way, and the law has not expressed any limitation upon the estate, or authorized the officers of the land department to express in the patent any reservation. In the absence of a located lode within the limits of the placer claim, and of a contest, it would seem that the officers of the land department need only ascertain that there is a placer which may be entered as such.

The law of 1872 supplied an apparent defect in the law of 1866, as amended in 1870, by providing for a reservation of known lodes. This is calculated to protect the government, and to prevent the entry of lodes as placer, and thereby get lode claims for two dollars and a half per acre.

The argument merely tends to show that the rights of the government were not sufficiently protected by the law of 1870, and the further provision made in 1872, in that matter, seems to show that, in the opinion of Congress, without the express reservation full title to the land would pass under the patent.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

A Patent to Public Lands is considered a conclusive determination by the government of the character of the land as agricultural or mineral: *Gale v. Best*, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550. When one has complied with all the requisites to entitle him to a patent for public land, he is regarded as the equitable owner thereof, though no patent has issued: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 480.

LAFHEY v. KAUFMAN.

[134 Cal. 391, 66 Pac. 471.]

VENDOR AND VENDEE—CONSIDERATION, RECOVERY OF.—The right of a vendee of land under an oral contract of purchase to recover a consideration paid is confined to those cases in which the vendor has refused or become unable to carry out the contract, the vendee having performed, or offered to perform, on his part. (p. 284.)

I. S. Thompson, for the appellants.

J. R. Welch, for the respondent.

³⁹² COOPER, C. Plaintiff recovered judgment, and defendants appeal from the judgment and order denying their motion for a new trial.

The amended complaint alleges that defendant Melvina orally agreed to convey to plaintiff a certain one-half acre of land for the sum of fifteen hundred dollars, payable five hundred dollars cash, five hundred dollars on the delivery of the deed, and the remaining five hundred dollars by note and mortgage upon the land; that, in accordance with the agreement, plaintiff paid the five hundred dollars cash, and that defendant Melvina has failed and refused to convey to plaintiff the said land; that plaintiff has demanded the return of the five hundred dollars so paid, but defendant Melvina has refused, and still refuses, to return the same.

To the said complaint defendants demurred, upon the ground, among others, that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants answered. In the answer, defendants allege that the defendant Melvina has always been, and now is, ready and willing to convey the said land, and to deliver a sufficient deed upon the payment of the remaining five hundred dollars and the execution of the note and mortgage, but that plaintiff has at all times refused to pay the five hundred dollars and execute the note and mortgage as per the agreement.

The court below refused to allow the defendants to prove the allegations of their answer, and in doing so, proceeded upon the theory that the contract being oral, the same was and is void, and that plaintiff can recover the five hundred dollars without offering to pay the balance, and without default of defendant Melvina. As the demurrer was overruled, and the case tried upon the theory that money paid on an oral contract for the sale of land may be recovered back by the vendee without any default of the vendor and ³⁹³ no tender of balance due by the vendee, this may be regarded as the only question in the case.

We think the court was in error in overruling the demurrer and in refusing to hear defendants' evidence. The action is not one to enforce the specific performance of a parol contract for the sale of lands, nor is it one in which a defense is based upon the statute of frauds.

The plaintiff, having made the contract, which is not unlawful nor against public policy, and having paid the money thereunder, cannot, of his own volition, and without fault: of

defendants, come into court and receive the assistance thereof to recover the money voluntarily paid. The money was paid for a valid consideration—to wit, the agreement to convey the land. It was only part of the consideration for such conveyance. The conveyance was not to be made until the balance of the consideration was paid according to the agreement.

Plaintiff, in order to entitle him to relief, must allege and show that he paid, or offered to pay, the balance of the consideration. The general rule is, that the vendee is not entitled to a conveyance until the full payment of the purchase money, and the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other. The plaintiff has wholly failed to allege any tender by him of the five hundred dollars remaining due, or that he offered to execute the note and mortgage as he agreed, or that he ever demanded a deed. He alleges a refusal to convey, but it was not incumbent upon defendant Melvina to convey until the consideration was paid, or offered to be paid, by plaintiff as he had agreed.

The right of the vendee of land, under a verbal contract, to recover the money or other consideration paid is, by all the authorities, confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed, or offered to perform, on his part: Browne on the Statute of Frauds, sec. 122; 2 Reed on the Statute of Frauds, sec. 738; Wood on Frauds, sec. 235; Abbott v. Draper, 4 Denio, 51; Green v. Green, 9 Cow. 46; Coughlin v. Knowles, 7 Met. 57, 39 Am. Dec. 759; Wetherbee v. Potter, 99 Mass. 354, 361.

³⁹⁴ We advise that the judgment and order be reversed and the court below directed to sustain the demurrer and allow plaintiff to amend his complaint if so advised.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the court below directed to sustain the demurrer and allow plaintiff to amend his complaint, if so advised.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

Vendor and Vendee.—Money paid in part performance of a parol contract to purchase land can be recovered only on the ground of the unwillingness or inability of the vendor to convey according

to the contract, or of a mutual abandonment of the contract: *Sims v. Hutchins*, 8 Smedes & M. 328, 47 Am. Dec. 90. It cannot be recovered if the vendor is ready and willing to perform: *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668; *Nelson v. Shelby etc. Co.*, 96 Ala. 515, 38 Am. St. Rep. 116, and cross-reference note thereto, 11 South. 695. Compare *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311.

LOFTIS v. MARSHALL

[134 Cal. 394, 66 Pac. 571.]

CONVEYANCE, WHEN VOID.—IF A CONVEYANCE IS MADE BY A GRANTOR WHEN IN A DRUNKEN CONDITION, and while incapacitated for business, and is signed under the representation made to him by the grantee and others that it is a letter, it is not merely voidable, but is void. (p. 287.)

RES JUDICATA—PARTIES.—A JUDGMENT IN EJECTMENT IN FAVOR OF AN ADMINISTRATOR is not admissible in a subsequent action against him personally by the same plaintiff to quiet title to the same land. (p. 287.)

JUDGMENT IN EJECTMENT IN FAVOR OF TENANT—EFFECT OF IN FAVOR OF HIS LANDLORD.—A judgment in ejectment in favor of a tenant of real property does not inure to, and protect, his landlord, though the latter employed the attorney and directed the defense. To become entitled to the benefit of a judgment, as an estoppel in his favor, the landlord must appear openly in the case, and, by permission of the court, undertake the defense, and his appearance or substitution should be entered of record, and allowed only upon notice to the parties. (p. 288.)

PLEADING NONDISCOVERY OF FRAUD.—In an action to quiet title against a conveyance executed by the plaintiff, his complaint alleging that in pursuance of a conspiracy between persons designated therein, he was kept in ignorance of the conveyance until a specified date sufficiently discloses that he did not discover the fraud, on account of which he relies for relief, until such date. (p. 289.)

James F. Tevlin, for the appellants.

Nagle & Nagle, for the respondent.

395 SMITH, C. This suit was brought against the defendant Mary E. Marshall, as administratrix of Samuel J. Marshall, deceased, to quiet the plaintiff's title to the land described in the complaint, against an instrument purporting to be a deed from the plaintiff to Mary Loftis, his wife (the grantor of the deceased), and against the claims of the defendants generally. The other defendants are Margaret Marshall, the only child

of the deceased, a minor, and Mary E. Marshall, in her personal capacity. The plaintiff had judgment, from which the defendants appeal. The facts of the case, as alleged in the complaint and as found, are as follows: The deed referred to, of date January 23, 1892, was signed by the plaintiff, then owner of the land in question, by the fraudulent procurement of his wife and her son, George D. Marshall. The plaintiff was at the time in a drunken condition, and wholly incapacitated from attending to business, and was induced to sign the deed by representations made to him by them that it was a letter to one Horrigan, and by the belief to that effect thus engendered. The deed was witnessed by George D. Marshall, and was proved ~~and~~ and recorded. Afterward, Mrs. Loftis, in consideration of love and affection, made a deed of the land to the deceased, Samuel J. Marshall, also her son, who took with full notice of the fraud. Samuel J. Marshall died September 21, 1894, and his administratrix, who was appointed in October, 1894, took possession of the premises. The sufficiency of the evidence to support the findings is not disputed.

The defendants, besides other matters, pleaded, in bar of the action, the judgment in a former suit brought by the plaintiff against Mary Loftis, Mary E. Marshall, and Michael Maloney to recover the possession of the land now in question, and on the trial the judgment-roll was offered in evidence, but, on objection being made to it, excluded, and this ruling, it is contended, was erroneous. This contention presents the principal question in the case.

The position of the appellants in this regard is, that, under the allegations of the complaint, the plaintiff's deed to his wife was not merely voidable, but void, and hence that the plaintiff's action is based upon and puts in issue the legal title, thus presenting the same issue as in the former case. This contention is perhaps correct, in so far as it assumes that upon the facts alleged in the complaint the deed in question was wholly void: *Hartshorn v. Day*, 19 How. 223; 1 *Story's Equity Jurisprudence*, sec. 60; *Newell on Ejectment*, 649; *Bump's Kerr on Fraud and Mistake*, 48; *Devlin on Deeds*, sec. 228. But assuming this to be the case, we are nevertheless of the opinion that the judgment could not operate as an estoppel against the plaintiff, and that the roll was rightly excluded.

This is sufficiently obvious with regard to the defendant Mary E. Marshall, in her personal capacity. As to her, all that was adjudicated in the ejectment suit was, that the plaintiff

should take nothing by his action, and all that was necessarily included in the judgment, or necessary thereto, was the fact, which is admitted, that she was not in possession. Whether the plaintiff was seised or not, could therefore make no difference in the result. The question of title, so far as she was concerned, was not involved: Code Civ. Proc., secs. 1908, 1909; Freeman on Judgments, sec. 256 et seq.

It is claimed, however, that the judgment in favor of Maloney inured to the benefit of the administratrix, the ground of the contention being that he was in possession as ³⁹⁷ her tenant, and that he was represented in the action by an attorney employed by her, but not otherwise; though it is not claimed that she appeared openly in the case, or that the plaintiff knew of her participation in the defense.

The authorities cited in support of this position are Valentine v. Mahoney, 37 Cal. 389, Russell v. Mallon, 38 Cal. 259, and McCreery v. Everding, 54 Cal. 168. These cases—all of which were anterior to the codes—did not turn upon the general law of estoppel, but, as explained in the case first cited, on certain peculiar features of our own law. It had previously been established that, under the practice act, the landlord was not a proper party to a suit in ejectment, which could be brought only against the tenant. The inconvenience of this practice was recognized, but it was deemed too firmly established to be disturbed. But, out of “regard to the position and rights of the landlord, . . . it [had been] held that when the tenant has notified the landlord of the pendency of the action, and has permitted him to appear and defend in the tenant’s name, the tenant cannot interfere with any subsequent proceedings to the prejudice of the landlord”: Valentine v. Mahoney, 37 Cal. 393, 394. It was concluded, therefore, that the landlord thus intervening in the action became the real party, his position being “similar to that of the holder of a non-negotiable chose in action who sues in the name of the legal holder, but for his own use” (Valentine v. Mahoney, 37 Cal. 395); or, it might have been said (to use an older illustration), similar to that of the plaintiff’s lessor, or that of the tenant in possession, in the old action of ejectment: 2 Phillips on Evidence, 11. But the decision is to be understood as applying only to cases where the landlord has appeared openly in the case, and been permitted by the court to undertake the defense; for in no other way could he obtain control of the case and become party thereto. For though “the landlord may ap-

pear and defend in his [the tenant's] name, or be substituted in his place," it is said "such appearance or substitution should be entered of record, and only allowed upon notice to the parties"; and "after it is once properly made, the tenant cannot interfere with any subsequent proceedings to the prejudice of his landlord": *Dutton v. Warschauer*, 21 Cal. 619, 82 Am. Dec. 765. Accordingly, in the concurring opinion in *Valentine v. Mahoney*, 37 Cal. 393, the ~~398~~ decision is limited to such cases, and it is said: "It would be dangerous to extend the rule to cases where there is nothing in the record of the action tending to show that the landlord took the defense of the action upon himself. The parties to be estopped," it is added, "ought to be indicated by the record itself" (page 399). In such cases, the landlord becomes in fact a party to the action, and thus the case comes within the provisions of section 1908 of the Code of Civil Procedure; but neither those provisions nor the cases cited can have any application to a case like the present, where the landlord was in no sense a party to the former suit. There was no error, therefore, in the exclusion of the record. Nor is the objection well taken that there was no finding on the issue of estoppel. The court, in effect, found that there was no estoppel; but had it failed to do so, there would have been no error. When the record was excluded, there was no evidence on the point before the court, and in fact the plea of estoppel presented the same defects as the evidence offered to support it, and was itself insufficient.

The court did not err in overruling the demurrer of the defendants. It is alleged that the plaintiff, "in pursuance of the conspiracy and the fraudulent and deceitful acts of Mary Loftis and George D. Marshall, was kept in ignorance of the grant (or deed) until the day of October, 1894." This, we think, was a sufficient allegation of the discovery of the fraud within three years before the commencement of the action. It was unnecessary to allege ignorance of the subsequent deed from Mrs. Loftis to Samuel J. Marshall, or ignorance of the recording. Nor do we think the allegation was material. On the theory of the appellants—which we have assumed to be correct—the deed was void, and the plaintiff, except as against an adverse possession of five years, could maintain his action at any time.

We advise that the judgment be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

Contracts of an Intoxicated Person are voidable but not void: Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Bush v. Breinig, 113 Pa. St. 310, 57 Am. Rep. 469. A contract entered into by one so drunk as not to know what he is doing may be ratified when he becomes sober; Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 585, 28 N. W. 156. See, also, Cooney v. Lincoln, 21 R. L. 246, 79 Am. St. Rep. 799, 42 Atl. 867.

Res Judicata.—A party sought to be bound by a former judgment must have been a party to both actions and in the same capacity: State v. Branch, 134 Mo. 502, 56 Am. St. Rep. 533, 36 S. W. 226; Fuller v. Metropolitan Life Ins. Co., 68 Conn. 55, 57 Am. St. Rep. 84, 35 Atl. 766. A judgment against one as an executor does not bind him as an individual in a subsequent action involving the same issue: First Nat. Bank of Amsterdam v. Shuler, 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 262.

A Judgment in Ejectment against a tenant is not conclusive against the landlord, although the latter retained an attorney to defend the suit against the tenant: Note to Caperton v. Schmidt, 85 Am. Dec. 210. On the conclusiveness of judgments in ejectment generally, see Sanford v. Herron, 161 Mo. 176, 84 Am. St. Rep. 703, 61 S. W. 839.

FEENEY v. HINCKLEY.

[134 Cal. 467, 66 Pac. 580.]

LIMITATIONS OF ACTIONS UPON JUDGMENTS.—UNTIL THE EXPIRATION OF THE TIME WITHIN WHICH AN APPEAL MAY BE TAKEN from a judgment, the statute of limitations does not commence to run against an action thereon. (p. 293.)

A JUDGMENT IS NOT FINAL so as to support an action thereon while the judgment debtor retains the right to appeal therefrom or to prosecute proceedings for a new trial. (p. 293.)

B. McFadden, for the appellant.

Cotton & Cotton and W. H. H. Hart, for the respondent.

467 HENSHAW, J. The action was brought to recover an unpaid balance due upon a judgment. It was commenced more than five years and less than six years after the entry of the judgment. This fact appearing upon the face of the complaint, defendant urged by demurrer that the cause of action

was barred by section 336 of the Code of Civil Procedure, which provides that an action upon a judgment or decree must be brought within five years. The court sustained the demurrer, and entered judgment accordingly, from which judgment this appeal is prosecuted. At the time of the entry of the judgment sued upon, the law permitted one year during which the losing party might prosecute his appeal. Upon this state of facts the question presented is, When does the five years' statute of limitations barring action upon a judgment commence to run—from the date of the entry of the judgment, or from the date when the judgment has become a final determination of the controverted matters between the parties litigant? It is apparent at once that the statute requires construction, and that something must be read into it by way of interpretation. If the five years commenced to run from the date of entry, the demurrer ⁴⁶⁸ was properly sustained. If, however, it commenced to run only when the judgment became a finality, when the rights of the parties were fixed by it, when it was admissible in evidence for or against either of them—when, in short, a cause of action upon it had accrued—then, clearly, in case an appeal from the judgment be taken, the five years cannot be said to have commenced to run until final determination following such appeal, or in the event that no appeal be taken, then only when the time within which such an appeal might be taken has fully elapsed.

Section 312 of the Code of Civil Procedure declares: "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute." "A judgment is the final determination of the parties in an action or proceeding": Code Civ. Proc., sec. 577. "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied": Code Civ. Proc., sec. 1049. An action will not lie upon a judgment until it has become final. Until that time has arrived, no cause of action upon the judgment has accrued: *Hills v. Sherwood*, 33 Cal. 474, 479. In *Gilmore v. American Cent. Ins. Co.*, 65 Cal. 63, 2 Pac. 882, it is said: "Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it." And in the same case (*Gilmore v. American*

Cent. Ins. Co., 67 Cal. 366, 7 Pac. 781), it is said that the judgment became final only, in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom had elapsed, and no motion was made and no appeal taken. In *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589, it is said: "Until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under section 1049 of the Code of Civil Procedure, to be deemed as pending." To like effect are *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757, and *In re Blythe*, 99 Cal. 472, 34 Pac. 108, in which latter case it is held: "That a judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and if the action in which the judgment ⁴⁶⁹ is rendered is still pending, necessarily the judgment is not final." And therein is quoted with approval the language of the supreme court of New York in *Webb v. Buckelew*, 82 N. Y. 560, where it is said: "Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the question at issue; and whenever it fails to fix and determine the rights of the parties, whenever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing." In *Story v. Story*, 100 Cal. 41, 34 Pac. 675, the trial court had admitted in evidence a judgment rendered in another action before the time for an appeal therefrom had expired, and this court, in reversing the judgment, said: "At the time that the court made its decision in the present case, the other action was still pending (Code Civ. Proc., sec. 1049), and while that action was so pending the judgment rendered therein could not be a bar to the prosecution of the present action." In *Brown v. Campbell*, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433, the court expounds the doctrine that *res adjudicata* applies only to final judgments, and proceeds: "The time to appeal from the judgment of November 24th had not expired when the cross-complaint was filed, and although no appeal had been taken therefrom, the action was still pending, within the legal meaning of the term, and the judgment was not a bar to a retrial of the matters alleged in the cross-complaint, under the rule announced by this court": Citing cases. While, as pointed out by Mr. Justice Harrison in his concurring opinion in *Naftzger*

v. Gregg, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757, and in Cook v. Rice, 91 Cal. 664, 27 Pac. 1081, cases may arise in which, for certain purposes, a judgment may be evidentiary before it has become final, these cases are exceptional, and the general rule prevailing in this state is that which has been so frequently declared. In other cases, such as Trenouth v. Farrington, 54 Cal. 273, where may be found dicta apparently declaring that the statute of limitations begins to run from the entry of the judgment, it will be noted that the present question was not before the court, the argument there urged being only to the effect that the statute of limitations began to run from the date of the ⁴⁷⁰ rendition, and not from the date of entry. The actions were one and all within five years' limitation if time began to run from the date of entry, but were barred if it was calculated from the date of rendition. The decisions, therefore, are not directed to the particular matter here in controversy.

It is the established rule and doctrine, then, that action will lie only upon a final judgment, and that in the generality of cases only such a judgment is admissible in evidence. If the five years statute of limitations is to commence to run from the date of the entry of judgment, the anomalous condition is presented of a right of action which may be barred before the cause of action has accrued. In every case, even where there was no appeal, it would mean that the period was shortened by construction from five years to four, and where an appeal had actually been taken, it might readily happen that the five years had elapsed before final determination upon appeal, and the statute of limitations would have barred the action before the right to commence it had ever rested with the prevailing party. It is of the essence of a statute of limitations that it acts upon a party sui juris, to whom a complete cause of action has accrued, and such is the provision of section 312 of the Code of Civil Procedure, above quoted. When one is under disability, or when from any cause the right of action is not perfect, the statute does not begin to run. The construction contended for by respondent would, as has been said, be an absolute reversal of and exception to this general salutary rule. Far more in harmony with the spirit of our law and with our adjudications upon this subject is the interpretation which holds that the statute begins to run only when the right of action has accrued, and this, as has been said and shown, is after final determination on appeal, in the event that an appeal has been

taken, or after passage of the time in which an appeal might be taken, in the event that none has been.

For the foregoing reasons the judgment appealed from is reversed and the cause remanded to the trial court, with directions to overrule the demurrer.

Beatty, C. J., Temple, J., and Garoutte, J., concurred.

Harrison, J., and McFarland, J., dissented.

The Statute of Limitations does not begin to run against a judgment until its entry on the record of the court: *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074. The commencement of an action on a judgment is not stayed by order of court, so as to prevent the running of the statute, merely because during a certain period the judgment creditor is required to obtain leave of court in order to bring suit thereon: *Osborne v. Lindstrom*, 9 N. Dak. 1, 81 Am. St. Rep. 516, 81 N. W. 72. The time during which execution is stayed by the court, at the instance of the judgment debtor, must be excluded from the period of limitation: *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788. See, too, *Thatcher v. Lyons*, 70 Vt. 438, 67 Am. St. Rep. 677, 41 Atl. 428.

An Action on a Judgment may be brought as soon as it is rendered: *Morse v. Pearl*, 67 N. H. 317, 68 Am. St. Rep. 672, 36 Atl. 255. But a judgment must be final before an action upon it can be sustained: *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. H. 761.

WINGERTER v. CITY AND COUNTY OF SAN FRANCISCO.

[134 Cal. 547, 66 Pac. 730.]

UNCONSTITUTIONAL STATUTE — RECOVERY OF MONEYS PAID UNDER.—An executor or administrator paying fees to a county clerk pursuant to the provisions of a statute is not entitled to recover the moneys so paid upon the statute's being subsequently declared unconstitutional. (p. 295.)

Franklin K. Lane, city and county attorney, and Hugo K. Asher, assistant, for the appellant.

Otto tum Suden, for the respondent.

⁵⁴⁷ HARRISON, J. An act of the legislature, approved March 28, 1895, entitled "An act to establish the fees of county, township, and other officers, and of jurors and witnesses in this state" (Stats. 1895, p. 267), directed the county clerk, upon the filing of the inventory and appraisement in the administration of an estate, to charge and collect the sum of one

dollar for each thousand dollars of the appraised valuation in excess of three thousand dollars. The executor of the last will and testament of Charles J. Wingerter filed the inventory and appraisal of the estate of his testator with the county clerk of San Francisco, August 12, 1895, and paid to that officer the sum of three hundred and twenty-five dollars as the fee for filing the same. June 2, 1897, the estate of the said testator was distributed to the plaintiff herein. In May, 1897, this court held that the above provision of the act of March 28, 1895, was unconstitutional: *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012. The present action was brought by the plaintiff in August, 1898, to recover the amount so paid ⁵⁴⁸ for filing the inventory, alleging in her complaint that it was paid under a mutual mistake of the executor and the clerk in believing that the statute was constitutional and valid. A demurrer to the complaint on the part of the defendant was overruled by the superior court, and the present appeal is from the judgment entered thereon.

Section 1578 of the Civil Code, upon which the plaintiff relies for recovery, is contained in the chapter relating to "consent," in the article upon contracts, and is explanatory of section 1567, which declares that an apparent consent is not real or free if obtained through "mistake." A contract thus obtained may be rescinded (section 1689), or its enforcement may be defended at law or enjoined in equity. The section cannot be invoked to sustain an action for the recovery of taxes or other public debts voluntarily paid under a statute which is afterwards declared to be unconstitutional. In *Cooley v. County of Calaveras*, 121 Cal. 482, 53 Pac. 1075, it was said: "The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." Under the rule there declared, the plaintiff is not entitled to a recovery. The mistake relied on in *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704, cited on behalf of the plaintiff, was held not to be a mistake of law, and the decision was placed upon the ground that by virtue of section 1542 of the Civil Code the release given to the plaintiff did not include the claim sued upon.

The judgment is reversed.

Garoutte, J., and Van Dyke, J., concurred.

Recovering Money Paid.—Money voluntarily paid, as a tax or license, under an unconstitutional statute or ordinance, cannot be recovered back: *Robinson v. Charleston*, 2 Rich. 317, 45 Am. Dec. 739; *Dickins v. Jones*, 6 Yerg. 483, 27 Am. Dec. 488; *Noyes v. State*, 46 Wis. 250, 32 Am. Rep. 710, 1 N. W. 1; *Taylor v. Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724; *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512; *Town of Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323. See, also, *Camden v. Green*, 54 N. J. L. 591, 33 Am. St. Rep. 686, 25 Atl. 357. It is otherwise, however, if the payment is involuntary: *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. H. 379.

IN RE LAMBERT.

[134 Cal. 626, 66 Pac. 851.]

CONSTITUTIONAL LAW—COMMITMENT OF ALLEGED INSANE PERSONS.—A statute under which a person may be committed to and confined in a hospital for the insane without giving him any notice of the proceeding against him and authorizing the judge to so commit him upon receiving a certificate from medical examiners, is unconstitutional. (p. 804.)

CONSTITUTIONAL LAW.—AN ORDER FOR THE COMMITMENT OF A PERSON TO AN INSANE HOSPITAL IS ESSENTIALLY A JUDGMENT, by which he is deprived of his liberty. Hence before it can be given, there must be a trial of the issues upon which it is founded. (p. 301.)

INSANE PERSONS — RIGHT OF ALLEGED TO BE HEARD BEFORE COMMITMENT.—The constitutional guaranty against a person being deprived of his liberty without due process of law is violated whenever a judgment may be entered finding a person to be insane, without giving him an opportunity to be heard in his defense of the charge, and upon such hearing, to offer evidence in support of his defense. If his right to a hearing depends upon the will or caprice of others, or upon the will or discretion of the judge who is to make the decision upon the issue, he is not protected in his constitutional rights. (p. 302.)

R. Clark, for the petitioner.

T. B. Hutchinson, for the respondent.

626 **HARRISON, J.** The petitioner alleges that he is illegally confined in the Napa state hospital and restrained of his liberty by A. M. Gardner, the superintendent thereof, and seeks his discharge. In his return to the writ issued upon the petition, the respondent shows that he holds the petitioner in custody by virtue of an order of commitment issued by the Honorable A. J. Buckles, judge of the superior court for the county of Solano, on November 9, 1899, committing said Lambert to the Napa state hospital as an insane person, and a proper sub-

ject for custody and treatment in an institution for the insane; and sets forth in his return a copy of the order of commitment, together with copies of the petition therefor, and of the certificate of lunacy accompanying the same, which were delivered to him at the same time that the petitioner was delivered at the hospital; ⁶²⁷ and averring that the petitioner is still insane, and not competent to be discharged. The sufficiency of this return is controverted by the petitioner upon the ground that the act of March 31, 1897 (Stats. 1897, p. 311), known as the "insanity law," under which the proceedings for his commitment were had, is unconstitutional, in that he is thereby deprived of his liberty without due process of law; that the proceedings thereunder are insufficient to authorize his commitment, and that upon the application therefor the judge of the superior court had no jurisdiction or authority to make that order, and that the said order, together with the documents accompanying the same, do not justify his detention or confinement.

The aforesaid act of 1897 purports to be a complete revision of the laws of this state on the subject of insanity, and provision is made therein for the organization of a state commission in lunacy, and the management of the several institutions for the insane, and the mode is prescribed by which patients are to be admitted to the several state hospitals, or otherwise cared for. The provisions authorizing the commitment of a person to a hospital are found in section 3 of article 3 of the act. An application for the commitment is to be made to the judge of the superior court of the county, by a relative or friend of the alleged insane person, or by any one of certain designated officials, and is to be accompanied by a certificate of lunacy, for which provision is made in the preceding section. This certificate is to be signed by two of the medical examiners authorized by that section, and must show that it is their opinion that the alleged insane person is actually insane, and "shall contain the facts and circumstances upon which their opinion is based, and show that the condition of the person examined is such as to require care and treatment in a hospital for the care, custody, and treatment of the insane." Upon its presentation to the judge with an application for the order of commitment, that officer is authorized forthwith to determine the question of the insanity of the person, and to immediately issue an order for his commitment to one of the state hospitals. The sheriff is to be immediately notified thereof, and is at once to

make provision for his transfer to such hospital. Upon his delivery of the person to the hospital, he shall at the same time deliver to the superintendent the application for the commitment, the certificate of lunacy, and the order of commitment, ⁶²⁸ as the authority of that officer for the detention of such person.

An examination of the foregoing provisions of the statute shows that there is no provision for giving to the alleged insane person any notice of the proceedings against him, and that, under its provisions, the first intimation that he may have thereof may be when the sheriff takes him into custody under the order of commitment. The person making the application for the commitment is not required to give him any notice thereof, nor is there any requirement that he shall be informed of the object for which the physicians are examining him. The direction that the application for the commitment shall be "accompanied" by a certificate of lunacy not only clearly indicates that the certificate shall have been made before the application is presented to the judge, but it also implies that it may be made at the mere request of the person who is seeking the commitment. This certificate may be made by any two physicians who have received and filed the certificate of a superior judge showing that they possess the requisite qualification. There is no limit to the number of physicians who may become such medical examiners, nor does the act authorize a superior judge to refuse his certificate to any physician who may show himself qualified therefor. No certificate is to be made unless two examiners shall find the person to be insane, but the person seeking the order of commitment is not concluded by the determination of the first examiners to whom he may apply, but is at liberty to continue his application for a certificate until he shall find two examiners who will certify to the insanity of the person. The examination is not made by them under any direction of the judge, nor do they receive any letter of authority or power to compel testimony. The statute does not require that their certificate shall be given under oath, nor does it require that the witnesses before the examiners shall give their testimony under oath, or provide for any oath to be administered to such witnesses. They are only required to make "such examination" of the person as will enable them to form an opinion "as to his sanity or insanity," and their examination may in fact be so conducted that he will have no knowledge that they are examining him for that purpose, or even

making any examination of him, and if after such examination they conclude that he is insane, they are to jointly so certify.

620 Upon the presentation to the judge of the certificate and application for the order of commitment, he is authorized "to proceed forthwith to determine the question of insanity." The statute does not require the judge, when he passes upon their sufficiency, to give any notice thereof to the alleged insane person, or even to require him to be brought into his presence. As the judge to whom the application is made has no notice of the proceedings until after the examination has been had and the certificate has been made, there is no opportunity prior thereto for him to direct any notice to be given. The provision in section 8 for the arrest of an insane person who is shown to be dangerous to person or property, is the only instance provided in the statute for any preliminary notice of a hearing, and the facts prescribed in that section for such notice have no existence in the present case. The provision that "upon the demand of any relative or near friend in behalf of such alleged insane person, the judge shall, or he may upon his own motion, order a hearing of the application," is no restriction upon his authority to proceed without giving any notice, since the whole proceeding may be conducted without the knowledge of any relative or friend of said alleged insane person, and if the application for his commitment is made by a relative or friend who has procured the certificate of lunacy from two medical examiners, such relative or friend would not be likely to demand any further hearing. There is also a provision in the act that if the application is made by any other person than a relative or friend, notice thereof shall be served upon one of certain designated relatives; but if, as in the present case, the application is by a relative or friend, the statute does not require any notice thereof to be given, either to the person alleged to be insane, or to any other friend or relative of his. The provision in section 4 for a trial upon the question of his insanity is effective only after the order of commitment has been made, under which the person may have been immediately placed in the hospital, and cannot be made a substitute for his right to have an opportunity to be heard and to defend himself against the charge before being deprived of his liberty. For the purpose of showing the inefficiency of this provision in protecting a person against an invasion of his constitutional right to a notice and a hearing before he can be deprived of his liberty, it is only necessary to read in connection therewith

the provision that before such trial can be had he must provide for the payment of the costs thereof, and also the provision of section 8 in article 1 of the act, that after he has been committed to the hospital, he may be restrained of all correspondence with the outer world, except with the superior judge and the district attorney of the county from which he was committed.

The statute thus clearly provides that the proceedings before the judge in a case like the present may be entirely ex parte, and that he may be satisfied that the alleged insane person is insane by merely examining the certificate and petition. He may issue the order of commitment upon the opinion of the two examiners, without any examination by himself of the person sought to be committed, or of the examiners who have made the certificate, and without any knowledge of the facts or testimony upon which they have made their certificate. In thus acting upon these documents, he takes as the sole basis of his action the opinion of the examiners, ascertained as before shown, that the individual is insane. The opinions of practitioners of medicine, however, upon the question of insanity are not always uniform or infallible, especially if such opinion is formed ex parte, or without an opportunity for a full investigation of the charge. The mere certificate of an opinion thus obtained ought not to be a sufficient warrant for an order for the confinement of a person in an insane asylum. There should, at least, be the semblance of a judicial investigation of which a public record can be preserved, before a person can be deprived of his liberty.

In making this order of commitment, the judge is not, however, in the exercise of any of the judicial authority of the state which the constitution has vested in the superior court, but exercises merely a statutory authority which has been conferred upon him by the insanity law. No step in the proceeding is taken by a court, nor does the statute require the application for the order or the certificate of the examiners, or the order of commitment, to be filed in any court, or made a matter of judicial record, or become a matter in any respect public, except such as results from their delivery to the superintendent of the hospital, as his authority for receiving and detaining the alleged insane person. In the exercise of such statutory authority, there is no presumption in favor of its validity, but, as in the case of any process issued by a tribunal or officer whose authority ⁶³¹ is special and limited by statute, it is essential

that the facts upon which depends his right to exercise such authority, or issue such process, shall not only exist, but shall be also set forth in the document by virtue of which the person is to be deprived of his liberty or estate.

It appears from the return in the present case that the application for the order of commitment was made by a person purporting to be a friend of the petitioner, and that it was presented to the judge of the superior court, November 9, 1899, and that upon the same day the order of commitment was made, and the petitioner delivered to the superintendent of the Napa state hospital. A certificate of two medical examiners, as provided by the act, dated November 9, 1899, was delivered to the superintendent at the same time with the order of commitment. This certificate is appended to a "statement of facts" setting forth many items in the history of the alleged insane person. It is evident from a mere inspection of this statement of facts that it was derived from others, but it does not appear whether it was prepared under the direction of the examiners after their examination of witnesses in reference thereto, or had been previously prepared and was submitted to them at the time they were requested to examine the petitioner. Neither does it appear whether the "facts" in the statement were obtained from the examination of witnesses, or accepted from mere rumor. The statement is not signed by any one, or in any way authenticated by the examiners, nor are the names of the persons from whom the facts were obtained given. The certificate itself does not give the names of the persons who were examined, nor does it contain the name of the petitioner, or state that they ever examined the petitioner, or that in their opinion he is insane—the blank space for the name of the person examined not having been filled with the name of anyone. It is only by inference from the accompanying documents that the certificate can be held to have any application to the petitioner.

It does not appear, either from the order of commitment or by the accompanying documents, that any notice was given to the petitioner of an intention to make an application for the order, or that he was ever notified or had any knowledge that the medical examiners would make any examination or investigation in reference to his insanity, or that the judge of the superior court ever directed any notice to be given him of the application, or of an intention to determine the question of his insanity; nor does it appear that he was present at the

time the matter was under consideration by the judge, or was at any time seen or examined by the judge.

The act in question was evidently suggested by the insanity law of New York, passed in 1896 (1 N. Y. Laws 1896, c. 545), and the provisions of that act have been closely copied. The New York statute, however, contains many provisions and safeguards for the individual, which are not contained in the law of this state. Section 62 of the New York statute, which corresponds to section 3 of article 3 of the California statute, provides that "notice of such application [for the order of commitment] shall be served personally, at least one day before making such application, upon the person alleged to be insane," a provision which is wholly omitted in the statute of this state. The section also provides that the judge may dispense with personal service, or may direct substituted service to be made upon some person to be designated by him, but that in such case he shall state, in a certificate to be attached to the petition for the commitment, his reasons for dispensing with personal service of such notice, and if substituted service is directed, the name of the person to be served therewith. In *People v. Wendel*, 33 Misc. Rep. 496, 68 N. Y. Supp. 948, the relator had been committed to an insane asylum under the provisions of this section, but had had no notice of the application, either personally or by substituted service on any one in her behalf, and there was no hearing at which she was either personally present or represented by any person. The court held that, to the extent that the insanity law authorized such proceeding, it was in violation of the constitution, in that it deprived her of her liberty without due process of law, and ordered her release.

An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given. Under the laws of this state, a guardian of the person or the estate of an insane person cannot be appointed without giving him notice of the application therefor (Code Civ. Proc., sec. 1763); nor can a judgment for so small a sum as five dollars be rendered against him unless he has been ⁶³³ served with a summons in the action: Code Civ. Proc., sec. 411. Much more is there reason for giving him notice of an application to deprive him of his personal liberty. The

provision in the statute for a notice to a relative or friend of the alleged insane person cannot be made the equivalent of a notice to the person himself. Neither can the provision that upon the application for a commitment a hearing may be had upon the demand of any relative or near friend in behalf of the alleged insane person, or upon the motion of the judge himself, be considered as due process of law. What constitutes due process of law may not be readily formulated in a definition of universal application, but it includes, in all cases, the right of the person to such notice of the claim as is appropriate to the proceedings and adapted to the nature of the case, and the right to be heard before any order or judgment in the proceeding can be made by which he will be deprived of his life, liberty, or property. The constitutional guaranty that he shall not be deprived of his liberty without due process of law is violated whenever such judgment is had without giving him an opportunity to be heard in defense of the charge, and upon such hearing to offer evidence in support of his defense. If his right to a hearing depends upon the will or caprice of others, or upon the discretion or will of the judge who is to make a decision upon the issue, he is not protected in his constitutional rights: *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633. To say that if he is in fact insane, therefore any notice to him would be vain, is to beg the very question whose determination underlies the right of the state to deprive him of his liberty. The fact of his insanity is to be determined before his right to his liberty can be violated. If that question is determined against him, without any notice or opportunity to be heard, or to introduce evidence in his behalf, and under such determination he is confined in the hospital, his constitutional guaranty is violated.

The case before us does not involve the right of the state to provide for the summary arrest of a person against whom a charge of insanity is made, and his temporary detention until the truth of the charge can be investigated. Such arrest would itself be a notice to him of the charge, under which he would be afforded an opportunity for a hearing thereon. Nor is there ⁶³⁴ involved the right of the state to permanently restrain an insane person of his liberty, whether such person be harmless or dangerous, but the question is, whether he is entitled to a judicial investigation of the charge that he is insane, and the right to be heard thereon before its determination. The question to be determined is, not whether the action of the judge in

investigating the insanity of the petitioner was conducted under the forms of law, and with proper regard for his rights, but whether the judge had the right to enter upon the investigation, or take any action whatever in reference to his insanity. In the absence from the statute of any requirement of notice to the person, any notice that might be given him would be without legal force and authority, and consequently, whether acted upon by him or disregarded, the proceeding would be equally ineffective. "It is not enough that he may by chance have notice, or that he may as a matter of favor have a hearing. The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done": *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 291. "It is not what has been done, or ordinarily would be done, under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement": *Bennett v. Davis*, 90 Me. 105, 37 Atl. 864.

The following authorities may be referred to in support of the foregoing views: *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633; *Petition of Doyle*, 16 R. I. 537, 27 Am. St. Rep. 759, 18 Atl. 159; *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794; *Portland v. Bangor*, 65 Me. 120, 20 Am. Rep. 681; *Bennett v. Davis*, 90 Me. 102, 37 Atl. 864; *People v. St. Saviour's Sanitarium*, 34 App. Div. 363, 56 N. Y. Supp. 431. In the case last cited the question was quite fully considered by the general term of the supreme court of New York. The relator had been committed to an asylum for inebriates for the term of one year, under a provision of a statute of that state authorizing such commitment to be made by any judge of a court of record, upon a certificate in writing, signed by two physicians, containing statements bringing the person within the description ⁶³⁵ named in the statute. It was held that as the order had been made without any notice to the relator, and without her presence, she was deprived of her liberty without due process of law, and that the commitment was void, the court very tersely and aptly phrasing the principle underlying its decision as follows: "No matter what may be the ostensible or real purpose in restraining a person of his liberty, whether it is to punish for an offense against the law, or to protect a person from himself, or the community from

apprehended acts, such restraint cannot be made permanent or of long continuance, unless by due process of law."

Under the foregoing considerations, it must be held that the insanity law of 1897, to the extent that it authorizes the confinement of a person in an insane asylum without giving him notice and an opportunity to be heard upon the charge against him, is unconstitutional, and that the proceedings by virtue of which the petitioner is held by the respondent are invalid.

It is ordered that the petitioner be released from the asylum.

Temple, J., Beatty, C. J., and Henshaw, J., concurred.

GAROUTTE, J., dissenting. As I read the foregoing opinion, it renders entirely void the present lunacy law. It is hardly necessary to say that such grave results should be avoided if possible, and that no technical construction of this law should be invoked which leads to such serious consequences. I believe a fair, liberal construction of the law may be had, which will support its constitutionality, and for that reason I dissent from the opinion of the court bearing upon that branch of the case. If time be allowed hereafter, I shall present my reasons for this dissent in detail.

Commitment of the Insane.—A valid proceeding to commit one as insane requires notice, and an opportunity to be heard before judgment. There must be a trial before a determination as to his sanity, and an opportunity to produce witnesses and evidence. Hence a statute authorizing such commitment, but not so framed as to compel a hearing before judgment, and which does not guarantee to the person charged an opportunity to be heard in defense, is invalid: *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, and note on due process of law as applied to insane persons, 57 N. W. 206, 794. But see *Dowdell, Petitioner*, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PRICE v. PEOPLE.

[193 Ill. 114, 61 N. E. 844.]

CONSTITUTIONAL LAW—OCCUPATION TAX.—The state may tax any occupation for the purpose of raising revenue, and such tax may be laid and collected in the form of a license fee. (p. 308.)

CONSTITUTIONAL LAW—OCCUPATION TAXES—LIMITATIONS UPON.—A constitutional provision giving the legislature authority to tax certain enumerated occupations for the purpose of raising revenue does not limit such power to the particular occupations specified. (p. 308.)

CONSTITUTIONAL LAW—OCCUPATION TAX—POLICE POWER—LICENSE OF OCCUPATIONS.—The state may, in the exercise of the police power, provide that any occupation properly subject to such power shall not be followed except under license issued by public authority upon the payment of a fee and the execution of a bond conditioned in accordance with the provision of the statute. (p. 309.)

CONSTITUTIONAL LAW.—WHAT OCCUPATIONS MAY BE TAXED under the police power by a statute requiring a license is a judicial question. (p. 309.)

CONSTITUTIONAL LAW.—PRIVATE EMPLOYMENT AGENCIES conducted for hire may be subjected to a license fee or tax. (p. 309.)

CONSTITUTIONAL LAW — OCCUPATION TAX.— The amount determined by the legislature to be paid as an occupation license fee is conclusive, except when it is manifest that the fee has been established, not to regulate the occupation, but to raise revenue under the guise of the police power, or by means of oppressive license fees, to deprive one of the right to exercise a lawful calling. (p. 311.)

M. St. P. Thomas and Altgeld, Darrow & Thompson, for the appellant.

H. J. Hamlin, attorney general, E. S. Smith, and B. D. Monroe, for the appellee.

¹¹⁵ BOGGS, J. Section 10 of an act of the general assembly entitled, "An act to create free employment offices in cities of certain designated populations, and to provide for the maintenance, management, and control of the same, and to prevent private imitations of the name of the same, and regulating private employment agencies," approved April 11, 1899, in force July 1, 1899 (Hurd's Stats. 1899, p. 848), is as follows: "No person, firm, or corporations in the cities designated in section 1 of this act [cities of not less than fifty thousand population] shall open, operate, or maintain a private employment agency for hire, or where a fee is charged to either applicants for employment or for help, without first having obtained a license from the Secretary of State, which license shall be two hundred dollars per annum, and who shall be required to give a bond to the people of the state of Illinois, in the penal sum of one thousand dollars for the faithful performance of the duties of private employment agent; and no such private agent shall print, publish, or paint on any sign, window, or newspaper publication, a name similar to that of the Illinois free employment offices. And any person, firm, or corporation violating the provisions of this act, or any part thereof, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars nor more than one hundred dollars."

The plaintiff in error was indicted at the November term, 1899, of the criminal court of Cook county, for opening, operating, and maintaining a private employment agency in the city of Chicago, without having first obtained a license from the Secretary of State, and without having given a bond to the people of the state of Illinois in the penal sum of one thousand dollars, conditioned for the faithful performance of the duties of private employment agent. ¹¹⁶ The defendant moved to quash the indictment on the ground that the offense charged was unknown to the law of Illinois; that section 10 of the act was void because repugnant to the state constitution and the federal constitution, and because oppressive and unreasonable, and that the entire act was void because repugnant to the state and federal constitutions. The court denied the motion. The defendant entered a plea of not guilty. A jury was duly waived and the case tried before the court. At the conclusion of the evidence the defendant sub-

mitted certain written propositions of law, by which the court was asked to hold (1) that the indictment did not charge the commission of any offense known to the law of Illinois; (2) that section 10 of said act was void because in contravention of the constitution of Illinois and (3) of the federal constitution; (4) that the said act was void as a whole because repugnant to the state constitution and (5) the federal constitution; (6) that said section 10 was void because unreasonable and oppressive, and (7) because prohibitive and not regulative. The court took the case under advisement, and at the May term, 1901, marked each of the propositions of law so submitted "refused," found the defendant guilty, and assessed against him a fine of fifty dollars. To reverse the judgment entered on that finding this writ of error has been sued out of this court.

The proof was clear that in the month of December, 1899, the defendant was engaged in the business of a private employment agent in the city of Chicago, and that he had not procured a license therefor from the Secretary of State. The plaintiff in error admits that if that section is valid in its entirety, the judgment of the criminal court was warranted by the evidence.

Section 1 of article 4 of the constitution of 1870 lodges the legislative power of the state in the general assembly, consisting of the Senate and House of Representatives. The supreme or sovereign power of legislation, ¹¹⁷ which under our form of government resides in the people, by the adoption of the said section 1 of article 4 of the constitution of 1870 was vested in the general assembly, subject only to the limitations and restrictions found in other portions of the organic instrument or in the constitution of the United States: *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *People v. Hill*, 163 Ill. 186, 46 N. E. 796. It is a well-recognized attribute of sovereign power to tax any occupation for the purpose of raising revenue, and such tax may be laid and collected in the form of a license fee: *Cooley's Constitutional Limitations*, 479; *Cooley on Taxation*, 570, 572, 591, 592, 599; *Banta v. City of Chicago*, 172 Ill. 204, 50 N. E. 233. Article 9 of the constitution of 1870 is expressly devoted to the exercise of the power of raising revenues. Section 1 of the said article authorized the general assembly to tax certain occupations specifically enumerated in the section. The occupation of private employment agent is not therein enumerated. The incorporation

into the constitution of the section giving the legislature authority to tax certain enumerated occupations for the purpose of raising revenue does not operate to limit the power of the law-making department of the state, in exercising the sovereign right of taxation of occupations, to the particular occupations specified. The familiar canon of construction, that such enumeration should be held by implication to inhibit the taxation of any occupation not specified in the section, cannot be given application, for the reason such construction is expressly forbidden by section 2 of article 9 of the organic law. Expressions in *Banta v. City of Chicago*, 172 Ill. 204, 50 N. E. 233, that such canon of construction is applicable were made inadvertently. No inhibition, therefore, arises against the imposition of a license fee upon the occupation of the plaintiff in error on the sole ground the fee was laid as a tax for purposes of revenue.

It is an attribute of sovereign power to enact laws for the exercise of such restraint and control over the ¹¹⁸ citizen and his occupation as may be necessary to promote the health, safety and welfare of society. This power is known as the police power. In its exercise the general assembly may provide that any occupation which is the proper subject of the power may not be pursued by the citizen except authorized by a license issued by public authority so to do. Such enactment may require the payment of a fee and the execution of a bond with security, conditioned in view of the objects and purpose of the act, as a prerequisite to the issuance of such license. What occupations are the proper subjects of this power is a judicial question: *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454; *Booth v. People*, 186 Ill. 43, 78 Am. St. Rep. 229, 57 N. E. 798.

That the public welfare demands legislation prescribing regulations and restrictions to protect against the evils of imposition and extortion which have manifested themselves in the conduct of private employment agencies, is not controverted by counsel for plaintiff in error, but such counsel contend that the license fee imposed by said section 10 of the act is enacted for the primary purpose of raising revenue, and not as a means of enforcing any police regulation. The argument is, the sole regulation or restraint prescribed by the section on the business of employment agents is, they shall not simulate the name of the state free employment offices es-

tablished by other sections of the act, and that the license fee of two hundred dollars has no relation to the cost of enforcing this regulation but is an oppressive, arbitrary exaction on the occupation, and is in contravention of the guaranties of both the federal and state constitutions that "no person shall be deprived of life, liberty, or property without due process of law." The position of the attorney general is, the general assembly is vested with the absolute and unrestricted power to determine what the license fee shall be, and that the judgment and discretion of the legislature, as expressed in the act, are conclusive as to the ¹¹⁹ reasonableness thereof. The attorney general concedes that the ordinance of a municipality prescribing the exaction of a license fee upon any lawful occupation in virtue of the police power delegated to such municipality by the general assembly may be open to review by the courts, and the reasonableness or unreasonableness of the license fee fixed by the ordinance may be determined by the court, but insists the court has no such power of review when the general assembly, in the exercise of the sovereign power of legislation with which it is vested, has fixed and declared the amount of the license fee.

The enactment in question does not seek to prohibit the pursuit of the occupation of an employment agent by a private citizen, but only the regulation of that occupation. If, under the guise of regulation, the general assembly should fix a license fee so exorbitant in amount as to operate as a prohibition upon the calling or create a monopoly, and clearly without relation to the cost and expense of regulation, the effect would be to deprive the citizen of a liberty and property right under the constitution, and it would be within the power of the court to so declare. But the courts always proceed with great hesitation and caution in passing upon the validity of the enactments of the general assembly. Primarily, we assume the law-making body considered the effect of the proposed enactment upon the constitutional rights of the citizen, and that it acted from patriotic and just motives, and in fixing the amount of the fee to be paid as a prerequisite to the right to a license to pursue the calling of an employment agent acted upon proper consideration and in the exercise of honest intentions. The requirements that a bond shall be given conditioned for the faithful performance of the duties of employment agent, and that a license shall be secured, are within themselves matters of regulation, in addition to the require-

ment that private agencies shall not simulate the name or signs of the public employment offices, and the ¹²⁰ conditions of the bond charge upon the public officials of the state, whose duty it is to enforce compliance with such conditions, further duties clearly in the nature of regulation of the occupation. What amount the applicant for a license shall be required to pay as a license fee is plainly committed to the general assembly for determination, and the action of that department of the state government is conclusive, except, beyond serious doubt, it is manifest the amount of the fee has been in any particular instance established, not with regard to the purpose of regulation of the occupation with the view of protecting the public welfare, but with the real purpose to raise revenue under the guise of the police power, or to subvert the proper exercise of that power to the prohibition, by means of oppressive license fees, of the right of the citizen to exercise a lawful calling, in violation of the constitutional guaranties against the destruction of the liberty and property right of a citizen.

This court would not assume to enter upon the consideration of the question, pure and simple, whether the legislative mind and judgment were at fault in determining the amount to be required as a license fee for the purpose of regulating an occupation in the interest of the welfare of the public. If errors or defects of this character exist in an enactment, the remedy is by way of an application to the general assembly, when again convened, for the repeal or modification of the ill-advised provision.

The judgment appealed from is affirmed.

Mr. Justice Magruder dissenting.

The Case of Bessette v. People, 193 Ill. 334. 62 N. E. 215, involved the question of the constitutionality of "An act to insure the better education of practitioners of horseshoeing and to regulate the practice of horseshoers in the state of Illinois": Laws 1897, p. 233. The act required any person practicing the business of horseshoeing in Illinois, with certain exceptions, to work four years at the business, and to be examined by the board of examiners provided for by the act, and to obtain a license to be issued by such board to practice such business in the state. By the terms of the act the issuance of a license by a board of five examiners appointed by the governor of the state is made a condition precedent to the right of practicing the business of horseshoeing. The supreme court, in passing upon the question thus presented, said:

"It is quite apparent from the terms of the act that it does not impose a tax upon the business of horseshoeing. We are not in-

clined to hold that the legislature has no power to impose a tax upon such occupation: *Howland v. City of Chicago*, 108 Ill. 496. We are not prepared to say that the legislature has not the power to impose an exaction in the form of a license fee for revenue upon the business of horseshoeing, even though the exaction of such license fee is not a tax: *Wiggins Ferry Co. v. City of East St. Louis*, 102 Ill. 560; *Howland v. City of Chicago*, 108 Ill. 496; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *Braun v. City of Chicago*, 110 Ill. 188; *Cooley on Taxation*, 2d ed., 592, 595, 597, 598, 600.

"The act of 1897, however, although it requires a license to be issued, does not impose such license for the purpose of revenue. The license fee imposed by the act must, therefore, be imposed for regulation. Cooley, in his work on Law of Taxation, says: 'License fees may be imposed: 1. For regulation; 2. For revenue; 3. To give monopolies; 4. For prohibition': *Cooley on Taxation*, 2d ed., 592. The license fee under the present act is certainly not imposed for prohibition or to give monopolies, and, as it is not imposed for revenue, its imposition must be for the purpose of regulation.

"That the license fee here under consideration is not imposed for revenue appears from the language of the act itself. In *Banta v. City of Chicago*, 172 Ill. 204, 50 N. E. 233, in speaking of a city ordinance which required a broker to pay a license, we said: 'The language of the ordinance, or its terms, may be expected to indicate with sufficient precision whether the license is required for purposes of revenue or for regulation merely, the intendment being that regulation is the object, unless there is something in the language indicating with sufficient certainty that the purpose is to produce revenue.' Judge Cooley also, in his work on Taxation, says: 'When a power to license is given, the intendment must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated': *Cooley on Taxation*, 2d ed., 597.

"The act of 1897 in reference to horseshoeing states, in section 10 thereof, that the license fee is charged 'in order to carry out the provisions of this act and maintenance of the said board of examiners.' The same section also provides that, out of the fees charged, the members of the board shall receive as compensation the sum of five dollars per diem for each and every day engaged in the discharge of their duties, and all necessary expenses incurred by them; and also provides that all moneys, received in excess of the per diem allowance and other expenses shall be held by the treasurer of the board, and shall not be used or expended by him, except as ordered by the board. These provisions seem to indicate that the license fee is merely imposed for the purpose of paying the expenses of enforcing the act, and not for the purpose of raising revenue in any way. Although the act provides that,

where a fine is collected upon a conviction for violating the provisions of the act, such fine shall be paid into the common school fund of the county, yet there is nothing to indicate that the license fee charged shall be appropriated as revenue for any purpose whatever.

"Therefore, the proper construction of the act being that the license fee is imposed for regulation and not for revenue, the question arises whether the occupation of horseshoeing is such an occupation as the legislature has any power to regulate in the manner provided for in this act. The general rule is, that a license fee will not be exacted for the purpose of regulating any trade, calling, or occupation, unless there is something in the nature of such trade, calling, or occupation, or in the circumstances surrounding it, which calls for the exercise by the state of its police power. In other words, licenses for regulation merely, and not for revenue, can only be justified upon the ground that a necessity exists for the exercise by the state, either directly or through delegation to municipal corporations, of its police power. The police power is limited to enactments, which have reference to the public health or comfort, or to the safety or welfare of society. It has been said that 'when the license is for regulation merely, . . . the question presented is, whether the business or occupation is one rendering special regulation important for any purpose of protection to the public, or to guard individuals against frauds and impositions': Cooley on Taxation, 2d ed., 600; Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610. Laws which interfere with the personal liberty of the citizen and his right to pursue such avocation or calling as he may choose, cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment: Ruhstrat v. People, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41; Bailey v. People, 190 Ill. 28, 83 Am. St. Rep. 116, 60 N. E. 98.

"Section 1 of article 2 of the constitution says: 'All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty, and the pursuit of happiness.' Section 2 of article 2 of the constitution is as follows: 'No person shall be deprived of life, liberty, or property without due process of law.' It has been said that the constitutional guaranties secured by these provisions include the right of the citizen to follow his individual preference in the choice of an occupation: Black on Constitutional Law, 404, 411; Ruhstrat v. People, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41. The general proposition that the enjoyment by the citizen of the privilege of pursuing an ordinary calling or trade, upon terms of equality with all others in similar circumstances, is a general part of his rights of liberty and property, has been assented to by the supreme court of the United States: Powell v. Pennsylvania, 127 U. S. 678, 88 Sup. Ct. Rep. 992, 1257. In Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427, it was said: 'The right to follow any of the common occupations of life is

an inalienable right. It was formulated as such under the phrase "pursuit of happiness," in the Declaration of Independence, which commenced with the fundamental proposition, that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' It was also said in the latter case: 'The liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.'

"In *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62, we said (147 Ill. 71) that 'liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare.' Although the power and discretion which the state legislature has in the matter of promoting the general welfare, and of employing means to that end, are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty, and property. And although the legislature may determine when the exigency exists for the exercise of the police power, yet it is for the courts to determine what are the subjects of the exercise of this power. It has often been said that the exercise of legislative discretion is not subject to review by the courts, when measures adopted by the legislature are calculated to protect the public health and secure the public comfort, safety or welfare; but the measures so adopted must have some relation to the ends thus specified: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 313, 40 N. E. 454, 462. We have said: 'When the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on, . . . the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment': *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41, and authorities there referred to. It has also been held that included in 'the right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it': *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41; *Black on Constitutional Law*, 412.

"An application of the principles above referred to to the provisions of this act of 1897 in relation to the business of horseshoeing condemns it as an invalid law. It is impossible to conceive how the health, comfort, safety, or welfare of society is to be promoted by

requiring a horseshoer to practice the business of horseshoeing for four years, and submit to an examination by a board of examiners, and pay a license fee for the privilege of exercising his calling. The ends to be secured by the exercise of the police power are the public health, comfort, safety, or welfare, but this measure has no relation to the ends thus specified. If this act is valid, then the legislature of the state can regulate almost any employment of the citizen by the requirement of previous study, and previous examination, and the payment of a license fee, and the issuance of a license. While we are always reluctant to put the stamp of invalidity upon any act of the legislative branch of the government, it is yet our duty, in the exercise of the trust imposed upon us by the constitution, to protect the constitutional rights and privileges of the individual citizen against such an invasion of them as is embodied in the present enactment.

"Section 15 of the act, being its last section, limits its application only to towns of fifty thousand inhabitants and over, although the portion of the act which precedes section 15 is so general in its terms as to include every horseshoer in the state. While the act is by section 15 limited in its application to towns and cities of fifty thousand inhabitants and over, it yet provides that it shall be optional with towns and cities of ten thousand inhabitants or over to come under the provisions of the act. Thus, section 15 seems to divide the towns and cities of the state into three classes—one class containing fifty thousand inhabitants and over, another class containing ten thousand inhabitants or over, and a third class containing less than ten thousand inhabitants. If the act can be construed as having any bearing whatever upon the municipalities known as towns and cities, it classifies them in such a way as to violate section 22 of article 4 of the constitution, which provides that 'the general assembly shall not pass local or special laws . . . incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village': 1 Starr & Curtis' Annotated Statutes, 2d ed., 134. This court will take judicial notice that the general act for the incorporation of cities and villages is in force in the city of Aurora, and has been adopted by that city as its charter: *Potwin v. Johnson*, 108 Ill. 70. The general incorporation act does not confer upon cities and villages the power to regulate the business of horseshoeing. Therefore, if the present act be construed as amending the general incorporation act by permitting cities and villages to regulate the business of horseshoeing, it is evidently a special law changing and amending the charter of the city of Aurora. It is true, that a classification of the cities and villages of the state by population, as a basis for legislation, may be valid, but a classification cannot be adopted arbitrarily upon a ground which has no foundation in difference of situation, or circumstances of the municipalities placed in the different classes. "There

must be some reasonable relation between the situation of municipalities classified and the purposes and objects to be attained': *People v. Knopf*, 183 Ill. 410, 56 N. E. 155; *People v. Martin*, 178 Ill. 611, 53 N. E. 309; *People v. Cooper*, 83 Ill. 585.

"It is difficult to see why towns or cities containing fifty thousand inhabitants and over should be subject to the requirements of the act, while cities or towns containing less than ten thousand inhabitants are relieved therefrom; and cities and towns having a population exceeding ten thousand and less than fifty thousand may or may not be brought within the exactions of the law according to their own option. So far as the act can be said to change or amend the charter of any city or town, it creates a purely arbitrary classification. There is no reasonable relation between the cities and towns classified in section 15 and the purposes and objects to be attained by the act in reference to horseshoeing: *Dupee v. Swigert*, 127 Ill. 494, 21 N. E. 622.

"But it is not clear that the act can be regarded as affecting in any way the charters of cities and towns. The terms of the sections of the act which precede section 15 do not concern cities and towns, but individuals. The legislature by the act does not delegate the power to control horseshoeing to cities and towns, but directly itself regulates the business of horseshoeing. In other words, the state itself acts upon the persons engaged in the business of horseshoeing, and does not delegate the power to regulate such business to cities and towns. It results that section 15 can only be regarded as an arbitrary division of individuals in the state who are engaged in the business of horseshoeing into three classes: 1. Those who live in towns or cities of fifty thousand inhabitants and over; 2. Those who live in towns or cities having a population less than ten thousand; 3. Those living in towns or cities having a population between ten thousand and fifty thousand, provided the latter choose to come under the provisions of the act. Clearly, the act unjustly and unreasonably discriminates between persons engaged in the same kind of occupation. The mere fact of the location of the individual in a particular town or city forms no basis for classification. Why should a man, pursuing the business of horseshoeing who lives in a city containing fifty thousand inhabitants or over, be required to take out a license, while a man living in a city containing between ten thousand and fifty thousand inhabitants need not take out such license, unless his city or town chooses to come under the provisions of the act, and the man who lives in a city or town containing less than ten thousand inhabitants is not obliged to take out any license at all?

"In *Bailey v. People*, 190 Ill. 28, 83 Am. St. Rep. 116, 60 N. E. 98, we held that 'an act, which arbitrarily discriminates against one class in the transaction of a business of a lawful nature and leaves unaffected by the act other persons or classes engaged in acquiring

property in a manner not distinguishable from that employed by those discriminated against, is in contravention of the constitutional guaranties respecting liberty and property.' In the latter case it was held that such discrimination 'is not comprehended within the true meaning of the words "due process of law," and is prohibited by the provisions of section 22 of article 4 of the constitution of 1870.' Where an act of the legislature attempted to make an employer criminally liable for discharging union employes, whereas he was not so liable for discharging a nonunion employe, it was held that the act drew an unwarrantable distinction between two classes of laborers, to wit, union laborers and nonunion laborers; and it was further held that such an act was unconstitutional as being in violation of section 22 of article 4 of the state constitution, which provides that 'the general assembly shall not pass local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever': 1 Starr & Curtis' Annotated Statutes, 2d ed., 134; Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. Where a statute does not relate to persons or things as a class, but to particular persons or things of a class, it is a special, as distinguished from a general law: 1 Starr & Curtis' Annotated Statutes, 2d ed., 134; Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. Judge Cooley, in his work on Constitutional Limitations, sixth edition, pages 481, 483, says: 'A statute would not be constitutional which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. . . . Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.'

"In the case at bar, the act deals with one class of workmen, to wit, horseshoers. It grants to horseshoers, living in cities and towns containing a population less than ten thousand, and in those containing a population between ten thousand and fifty thousand, a special privilege, to wit, the privilege of being exempt, either entirely or conditionally, from the obligation to take out licenses to pursue their business, while it requires horseshoers living in cities and towns containing a population of fifty thousand or over, to obtain such license. The manner in which the act discriminates in favor of particular persons of one class pursuing one occupation, and against all others of the same class, places it in opposition to the constitutional guaranties hereinbefore referred to: Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007; Millett

v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 462; *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41."

Licenses and Occupation Taxes.—The legislature may prohibit persons from following a particular calling without first obtaining a license: *State v. Zeno*, 79 Minn. 80, 79 Am. St. Rep. 422, 81 N. W. 748. And it may authorize the collection of a license fee from persons engaging in certain vocations or businesses: *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516; *State v. Snowman*, 94 Me. 99, 80 Am. St. Rep. 380, 46 Atl. 815; *Denver etc. Ry. Co. v. Denver*, 21 Colo. 350, 52 Am. St. Rep. 239, 41 Pac. 826; *Springfield v. Smith*, 133 Mo. 645, 60 Am. St. Rep. 569, 40 S. W. 757. A privilege tax may be exacted of corporations doing business in the state: *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 Am. St. Rep. 143, 22 South. 627; *Pullman Co. v. Adams*, 78 Miss. 814, 84 Am. St. Rep. 647, 30 South. 757. Statutes requiring those engaged in a certain business to give a bond conditioned for the faithful performance of their contracts and duties have been upheld: *State v. Wagener*, 77 Minn. 483, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610. *Contra*, *People v. Berrien Circuit Judge*, 124 Mich. 664, 83 Am. St. Rep. 352, 83 N. W. 594.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY *v.* MOCHELL.

[193 Ill. 208, 61 N. E. 1028.]

NEGLIGENCE.—A PASSENGER LAWFULLY UPON A STREET-CAR is not chargeable with contributory negligence if injured by a collision with a railroad train at a street crossing. (p. 319.)

NEGLIGENCE OF RAILWAYS—INJURY TO STREET-CAR PASSENGER.—In the event of a collision between a street-car and a railroad train at a crossing a verdict in favor of an injured street-car passenger must stand as against the railroad company, if a finding that the injury resulted from the combined negligence of the employes of the two companies is justified by the evidence. (p. 319.)

NEGLIGENCE—PROHIBITED SPEED OF TRAINS.—The running of a railroad train through a city in excess of the speed authorized by ordinance is negligence, as matter of law. (p. 320.)

NEGLIGENCE.—NONPERFORMANCE OF A DUTY COMMANDED BY A STATUTE, resulting in injury to another, is negligence as a conclusion of law. (p. 320.)

W. H. Lyford, S. A. Lynde, and A. M. Cross, for the appellant.

E. B. Tolman, for the appellee.

²⁰⁹ HAND, J. This is an action brought by the appellee in the superior court of Cook county against the Calumet Electric Railway Company and the Chicago and Eastern Illinois Railroad Company, jointly, to recover for a personal injury. The jury returned a verdict of fifteen thousand dollars against the defendants, upon which judgment was rendered. The Chicago and Eastern Illinois Railroad Company perfected an appeal from such judgment to the appellate court for the first district, in which court the appellee filed a remittitur of five thousand dollars and the judgment was affirmed, and a further appeal has been prosecuted to this court.

The appellee, on the twenty-fifth day of February, 1897, was a passenger on a car of the Calumet Electric Railway Company, the tracks of which run east and west and cross at right angles the right of way of appellant at One Hundred and Third street, in the city of Chicago. The car in which appellee was riding approached the crossing from the east. When it was about a block and a half away appellant's flagman lowered the gates at One Hundred and Third street on account of the approach of a freight train from the south and a passenger train from the north. The passenger train blew a whistle and the flagman rang the bell. The electric car, however, kept on its way, crashed through the gates, ran upon the appellant's track, was struck by the passenger engine and broken into pieces, the motorman and conductor thereon, who were drunk, were both killed, and the appellee was severely injured.

The negligence charged against appellant is the running of its passenger train at an excessive and prohibited rate of speed. The appellee's evidence tended to show that the passenger train was running at the rate of from fifty to sixty miles, and the electric-car at the rate of from ten to fifteen miles per hour, at the time of the collision, and that the electric-car was about thirty and ²¹⁰ the engine about one hundred feet from the crossing when the electric-car crashed through the gates.

It is first contended by appellant that the alleged negligence of appellant was not the proximate cause of the injury. That question was one of fact for the jury: *Fent v. Toledo etc. Ry. Co.*, 59 Ill. 349, 14 Am. Rep. 13; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285; *Chicago etc. R. R. Co. v. Hines*, 183 Ill. 482, 56 N. E. 177; and the jury having found such fact in favor of the appellee—which finding has been

approved by the appellate court—the appellant is concluded by the judgment of the appellate court if there is sufficient evidence in the record upon which to base such finding. The appellee was lawfully upon the electric-car, and contributory negligence cannot be imputed to her. The evidence was sufficient to justify the jury in finding that the injury was the result of the joint negligence of the servants of the street railway company and of appellant: *West Chicago St. R. R. Co. v. Piper*, 165 Ill. 325, 46 N. E. 186; *Wabash etc. Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; or, regardless of the negligence of the street railway company, that the car in which the appellee was riding would have passed safely over the track of appellant had its train not been running at a prohibited rate of speed. Furthermore, the street-car upon which appellee was a passenger was completely demolished. The jury were justified in finding that had appellant's train only been running at the permitted rate of ten miles, instead of at the prohibited rate of fifty or sixty miles per hour, it might have been stopped, or substantially stopped, before it struck the electric-car, as at the time the electric-car crashed through the gate it was seen by the fireman upon the engine. The engine at that time was about one hundred feet north of the crossing.

It is further contended that the court misdirected the jury as to the law on behalf of the appellee: 1. In instructing the jury that running its train in excess of the ²¹¹ speed authorized by ordinance is negligence as matter of law; and 2. In omitting from the eighth instruction the qualification that their finding must be based upon the evidence. The statute provides that "whenever any railroad corporation shall, by itself or agents, run any train, locomotive engine, or car at a greater rate of speed in or through the incorporated limits of any city, town, or village, than is permitted by any ordinance of such city, town, or village, such corporation shall be liable to the person aggrieved for all damages done the person or property by such train, locomotive engine, or car, and the same shall be presumed to have been done by the negligence of said corporation or their agents": *Hurd's Stats. 1899*, c. 114, par. 87, p. 1332. In *Terre Haute etc. R. R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20, on page 555 (129 Ill., 22 N. E. 24), it is said: "It is insisted that . . . the court . . . committed an error in giving to the jury the plaintiff's third instruction, which held, in substance, that if the de-

fendant omitted to perform its statutory duty in relation to ringing a bell or sounding a whistle on its engine, such conduct constituted a prima facie case of negligence. We are unable to concur with counsel in this view. A statute commanding an act to be done creates an absolute duty to perform such act, and the duty of performance does not depend upon and is not controlled by surrounding circumstances. Nonperformance of such statutory duty, resulting in injury to another, may therefore be pronounced to be negligence as a conclusion of law"; and the omission from an instruction of the words "from the evidence," after the words "if you believe," is not erroneous, where in other parts of the same instruction, or in other instructions, it clearly appears that the jury were instructed that their belief must be founded upon the preponderance of the evidence: *Belden v. Woodmansee*, 81 Ill. 25; *Cunningham v. Stein*, 109 Ill. 375; *Decatur Cereal Mill Co. v. Gogerty*, 180 Ill. 197, 54 N. E. 231. A violation of the ordinance as to the rate of speed having ²¹² been clearly shown, and as the instructions, as a whole, require the finding of the jury to be based upon the evidence, we think the instructions complained of are substantially correct.

It is contended that certain remarks of appellee's attorney in argument to the jury were objectionable. The evidence upon which he was commenting had gone to the jury without objection, and was therefore properly in the record, and the action of the court in permitting counsel to call the attention of the jury to such evidence does not, in our judgment, constitute reversible error.

The judgment will be affirmed.

Mr. Chief Justice Wilkin dissenting.

Running a Train at a Rate of Speed prohibited by ordinance is negligence per se: *Hutchinson v. Missouri Pac. Ry. Co.*, 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852; *Jackson v. Kansas City etc. Ry. Co.*, 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32. It has been held, however, that one injured by a train running at such speed must, to entitle him to recover, prove that his injury was caused by the rate of speed, without contributory negligence on his part: *Reidel v. Philadelphia etc. R. R. Co.*, 87 Md. 153, 67 Am. St. Rep. 328, and cross-reference note thereto, 39 Atl. 507. See, also, *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827.

Concurring Negligence.—The fact that some other cause operated with the negligence of a defendant in producing an injury does not relieve him from liability, where such other cause would not have produced the injury but for the defendant's negligence: *Knouff v. Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292, 59 N. E. 347.

If one suffers injury from the joint negligence of two parties, both are liable jointly and severally: *Pugh v. Chesapeake etc. Ry. Co.*, 101 Ky. 77, 72 Am. St. Rep. 392, and cross-reference note thereto, 39 S. W. 392; *City Electric Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426. Where a railway passenger is injured by a negligent collision of his train with that of another company, he may maintain an action against either company: *Wabash etc. Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791. This principle is applied in case of a collision of steamboats in *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178. See, also, *Transfer Co. v. Kelly*, 36 Ohio St. 86, 38 Am. Rep. 558.

GROSS v. PEOPLE.

[193 Ill. 260, 61 N. E. 1012.]

JUDGMENTS—RES JUDICATA—INSTALLMENTS OF SPECIAL ASSESSMENTS.—A judgment sustaining the action of a lower court in overruling objections to an application for a judgment of sale for certain installments of a special assessment is res judicata as to subsequent installments as to all objections raised, or which might properly have been raised, and determined in the former proceeding. (p. 323.)

JUDGMENTS.—QUESTIONS THAT ARE DEEMED RES JUDICATA are not confined to those raised and insisted on at the former adjudication, but embrace also those which were involved in the issue and might have been properly insisted upon. (p. 324.)

Roberts, Roberts & Owens and Taylor & Martin, for the appellants.

R. N. Holt, Wilson Moore, and McIlvaine, for the appellee.

²⁶⁰ CARTER, J. This is an appeal from a judgment and order of sale entered against appellants' land by the county court of Cook county for the nonpayment of the fifth installment ²⁶¹ of a special assessment which had been made and confirmed in 1895 to pay the cost of a connected system of sewers and drains put in and along the streets of the village of Grossdale. The substance of the objections filed to the rendition of judgment was: 1. That the improvement made was not the one contemplated by the ordinance, but varied greatly therefrom—that is, that the sewers were laid on lines different from those specified in the ordinance, and at different depths, and in streets not provided for in the ordinance, and that the size of the pipes was changed and enlarged; 2. That there is a large excess of the assessment, which should be refunded ratably, which excess was caused by putting in sewers

not provided for in the ordinance, and by illegal expenditures for expenses in securing the confirmation of the assessment, in expert and other witness fees, attorneys' fees, etc.

As against the right of the objectors to insist on the matters contained in the first objection in this application for judgment, appellee contended below, and contends here, that the matters complained of are *res judicata*, and that the objectors are estopped by judgment from litigating said matters in this case.

We are of the opinion that the county court did not err in overruling the objections nor in rendering judgment. The improvement was a large one, covering nearly the whole of the village, and cost nearly one hundred thousand dollars. It was made in 1895. These appellants appeared in court in each of the years 1896, 1897, and 1898, and filed objections to the application for judgment, respectively, for the first, second, and third installments, and afterward appealed to this court from the judgment of the county court overruling such objections and entering order of sale: *Walker v. People*, 170 Ill. 410, 48 N. E. 1010; *Gross v. People*, 172 Ill. 571, 50 N. E. 334; *Walker v. People*, 169 Ill. 473, 48 N. E. 694; *Gross v. People*, 169 Ill. 635, 48 N. E. 1108. See, also, *Gross v. Village of Grossdale*, 176 Ill. 572, 52 N. E. 370, a writ of error to reverse the judgment of confirmation.

²⁶² Section 66 of the act of 1897 (Hurd's Stats. 1899, p. 376), concerning local improvements, provides: "Upon the application for judgment of sale upon such assessment, or matured installments thereof, or the interest thereon, or the interest accrued on installments not yet matured, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment, or the application for the confirmation thereof, and no errors in the proceeding to confirm, not affecting the power of the court to entertain and consider the petition therefor, shall be deemed a defense to the application herein provided for. When such application is made for judgment of sale on an installment only, of an assessment payable by installments, all questions affecting the jurisdiction of the court to enter the judgment of confirmation shall be raised and determined on the first of such applications. On application for judgment of sale on any subsequent installment, no defense, except as to the legality of the pending proceeding, the

amount to be paid, or actual payment, shall be made or heard. And the voluntary payment by the owner or his agent of any installment, of any assessment, levied on any lot, block, tract, or parcel of land, shall be deemed and held in law to be an assent to the confirmation of the assessment-roll, and be held to release and waive any and all right of such owner to enter objections to the applications for judgment of sale and order for sale."

Some of these applications for judgment and orders of sale were made after the act of 1897 took effect and became applicable to proceedings for their collection, and we need only inquire whether these objectors can, on this application, file objections which could have been adjudicated in any one of the former adjudications where they appeared and objected to judgment. We are of the opinion they cannot, but that they are estopped by the former judgments and are expressly precluded by the statute. Every question embraced in their first objection ²⁶³ filed in this case could have been raised in the former proceedings. They were fully known to them at that time. The mere fact that they did not include in their former objections the matter now complained of is immaterial, inasmuch as they might have done so had they seen proper. The questions that are *res judicata* are not confined to those raised and insisted on at the former adjudication, but they embrace also those which were involved in the issue and might have been properly insisted on: *Bailey v. Bailey*, 115 Ill. 551, 4 N. E. 394; *Warren v. Cook*, 116 Ill. 199, 5 N. E. 538, 21 Am. & Eng. Ency. of Law, 216. It would be intolerable practice to permit the property owner, at every application of the collector for judgment for a delinquent installment, to make and litigate objections which should have been made and litigated at the confirmation, or when objections were filed to application for judgment of sale on prior installments. It is no hardship for the objector to bring forward all of his objections at once which pertain to the whole assessment. He cannot be heard by piecemeal. Filing the objections which appellants did on former trials was a tacit admission that there were no other objections: *Neff v. Smyth*, 111 Ill. 100. See, also, *Louisville etc. Ry. Co. v. Carson*, 169 Ill. 247, 48 N. E. 402; *Warren v. Cook*, 116 Ill. 199, 5 N. E. 538; *Litch v. Clinch*, 136 Ill. 410, 26 N. E. 579; *Kelly v. Donlin*, 70 Ill. 378. Nor does *Young v. People*, 171 Ill. 299, 49 N. E. 503, sustain appellants' position in this case, as they

contend. The act of 1897 is applicable to proceedings for the collection of delinquent installments taken after said act went into effect.

The second objection is untenable, because it is not made to appear that the indebtedness, which in this case consisted of outstanding bonds, against said fifth installment had been paid, or enough thereof collected with which to pay it.

No error was committed, and the judgment will be affirmed.

Res Judicata.—The conclusiveness of a judgment is not confined to the matter litigated, but includes the finding of any facts which were in issue and necessarily decided: *State v. Branch*, 134 Mo. 502, 56 Am. St. Rep. 533, 36 S. W. 226; though no specific finding may have been made thereon: *Short v. Taylor*, 137 Mo. 517, 59 Am. St. Rep. 508, 38 S. W. 952. A judgment is conclusive, not only as to every question actually presented and considered, but upon every point within the issues that might have been presented and decided: *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599; *Hentig v. Redden*, 46 Kan. 231, 26 Am. St. Rep. 91, 26 Pac. 701; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444, 70 N. W. 493; monographic note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 570. Compare *Pitts v. Oliver*, 13 S. Dak. 561, 79 Am. St. Rep. 907, 88 N. W. 591; *Freeman v. Barnum*, 131 Cal. 386, 82 Am. St. Rep. 365, 63 Pac. 691; *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55, 57 Am. St. Rep. 84, 85 Atl. 766.

DECKER v. DECKER.

[193 Ill. 285, 61 N. E. 1108.]

DIVORCE—ADULTERY AS BAR.—A complainant who asks a divorce on the ground of extreme and repeated cruelty should be denied a decree if guilty of adultery. (p. 329.)

DIVORCE.—ADULTERY IS A GOOD RECRIMINATORY DEFENSE to a charge of extreme and repeated cruelty. (p. 330.)

DIVORCE.—ADULTERY IS A DEFENSE IN RECRIMINATION in all divorce cases, regardless of the cause for divorce or the kind of relief prayed for. (p. 332.)

Schneider & Schneider and A. L. Phillips, for the appellant.

Cloud, Moffett & Thompson, for the appellee.

²⁸⁶ **BOGGS, J.** The parties hereto are husband and wife. The wife, the appellant, filed a bill for divorce against her husband, the appellee, in which she charged that he, at the time of their marriage, was "naturally impotent and incapable to perform the act of copulation," and unable to cause her to be-

come pregnant and bear children, etc., and that since the marriage he has been guilty of repeated acts of extreme cruelty toward her. The allegations of the bill were denied by the answer filed thereto. The appellant stipulated she would rely wholly and alone upon the charge of extreme and repeated cruelty, and that issue was heard before and submitted to a jury for decision. The verdict was adverse to the contention of the wife. Subsequently a retrial was awarded, and the husband was granted leave to file an amended answer. The amended answer denied that complainant had always conducted herself toward him as a chaste, dutiful, and affectionate wife, as alleged in the bill; denied that he had in any manner disregarded his marriage vows and obligations, and also all and singular the charges of cruelty contained in her bill, and averred that the complainant deserted and abandoned him, and that cohabitation between them had ceased, and she gave herself over to adulterous intercourse with other men, and became pregnant with child by reason of such adulterous practices, and had given birth to such child since the trial of the cause at a former term. The answer alleged the defendant had not been guilty of any violation of his marriage vows, and that the complainant was not acting in good faith in filing the bill. The appellant excepted to the answer on the ground that the defendant could not avail of the charge of adultery in recriminatory defense to the charges of extreme and repeated cruelty. The court overruled the exceptions. The complainant elected to abide her pleadings, the bill was dismissed, and this appeal ²⁸⁷ was perfected to test the correctness of the ruling of the chancellor.

The insistence of the appellant is that adultery cannot be set up, by way of recrimination, as a defense to charges of extreme and repeated cruelty and impotency, but only when the charge is that of adultery. This contention is chiefly based upon the construction given by counsel to section 10 of chapter 40 of the Revised Statutes, entitled "Divorce." The section reads as follows: "If it shall appear, to the satisfaction of the court, that the injury complained of was occasioned by collusion of the parties, or done with the assent of the complainant . . . thereto, or that both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce shall be decreed." Counsel for appellant construe this section to declare that adultery can only be

pleaded in answer as a recriminatory defense to a charge of adultery in the bill, and argue that if it had been the legislative intent that adultery should be permitted to be pleaded in answer to the other statutory grounds entitling a complainant to a divorce, this intention would have been expressed in this section of the statute.

Counsel are in error as to the purpose or office of the provisions of said section 10. The section was not enacted for the purpose of controlling or directing the course of the pleadings or the formation of issues in a proceeding for divorce. Upon the contrary, it has relation to the power which is vested in the chancellor to take action in a divorce proceeding on grounds entirely without and beyond the issues made by the parties. A proceeding for the dissolution of the marriage relation involves interests other than those of the husband and wife, who are the parties complainant and defendant. The separation of husband and wife by judicial decree concerns vitally the children, if any, of the discordant couple, and affects, in a general way, the home life and ²⁸⁸ domestic relations of the people, the public morals, the prevailing system of social order, and, in a greater or lesser degree, the welfare of every citizen. These interests are not represented by either of the parties to a divorce proceeding, but the law has not left them unprotected. It is within the power of the chancellor of whom a decree of divorce is asked to stand as a representative of the public, and, in a proper case, to refuse to grant the decree though the grounds of such refusal be without the issues made by the pleadings of the parties.

The conclusions drawn from the authorities on the subject by the author of the article on "Divorce," in the American and English Encyclopedia of Law, second edition, volume 9, pages 728, 729, is expressed in these words: "The state is interested in the preservation of the marriage relation, since this relation is promotive of morality and inures to the perpetuation of its citizens. . . . Since, as citizens of the state, the relatives and children of the parties have an interest in the marriage but cannot be protected, as they cannot become parties to a divorce suit, the interest of such persons is said to be represented by the court. In some states the court is relieved of such anomalous position by statutes authorizing the appearance of a prosecuting attorney or other officer to represent the state. Thus, a suit for divorce is not a suit

between two parties, but is a triangular proceeding, in which the state is an adverse party, as the state has an interest in all suits for divorce. . . . The court, as representative of the state, is not bound by the pleadings of the parties, but may, on its own motion, examine witnesses as to suspicious conduct showing recrimination, collusion or condonation, although the defendant has not alleged such defenses": See, also, 2 Bishop on Marriage and Divorce, c. 16.

The general assembly of our state enacted what was intended to be a complete code on the subject of divorce, and having in the first section thereof authorized the ²⁸⁹ dissolution of the marriage relation for certain causes therein specified, incorporated said section 10 now under consideration in the enactment, in view of the power of the chancellor, as the representative of the rights and interests of the general public existing in divorce cases, to go beyond the pleadings of the husband and wife and render such decree as should be proper for the preservation of such rights and interests of the public. This section makes it the imperative duty of the chancellor to refuse to dissolve the marriage relation in all cases where it shall satisfactorily appear that the injurious act or acts relied upon to authorize the decree of divorce was or were occasioned by the collusion of the parties, or with the assent of the party so complaining, for the purpose of obtaining a divorce, or by the consent of such party, or where adultery is charged and both parties were shown to have been guilty of adultery. In the absence of the section ample power and authority resided in the chancellor to refuse to grant a divorce for any or all of the reasons or grounds specified in section 10, but whether he should do so or not was within his judicial judgment and discretion, or his conscience, as it is most frequently called. The enactment of the section added nothing to the authority of the chancellor, but operated to make it his imperative duty to do that which, without the provisions of the section, he had ample power to do. The pleadings of the parties, or the issues they may see fit to make, are wholly inconsequential, so far as the exercise of this power of the chancellor is concerned.

If, in a divorce proceeding where the complaining husband or wife seeks the dissolution of the marriage tie on the ground his or her consort has been guilty of adultery, it is disclosed to the chancellor that the complainant has been guilty of the

same violation of the marriage obligation, the chancellor, as the representative of the public interest and the welfare and purity of society, must, in obedience to the command of said section ²⁹⁰ 10 of the divorce act, refuse to grant a decree of divorce. In this respect section 10 is a declaration of a fixed public policy that the benefit of the statutory provisions authorizing decrees of divorce shall not be extended by the courts to cases where both the husband and wife have committed the offense of adultery, but that those who had each so offended against the marriage relation should be dismissed from the court and left to themselves as husband and wife. But that is not the question presented by this record. Adultery is not to be answered for by the appellee. On the contrary, it is averred by the complainant (the appellant) that the defendant (the appellee) is by nature physically incapable of performing the act of cohabitation, and a decree is asked for that reason, and also for the further alleged reason that he has been guilty of acts of extreme and repeated cruelty to the complainant. Is it a ground of exception to appellee's answer to these charges that the answer avers the complainant in the bill has committed adultery, in violation of her marriage obligations and duty? The contention of counsel for appellant is, adultery is a good recriminatory defense only when the charge is adultery, and that the defendant in the case at bar, the charge being impotency and extreme and repeated cruelty, should have filed a cross-bill if he desired to charge his wife with adultery. If he had filed a cross-bill, and upon a hearing the evidence proved the truth of the charge of cruelty made by the wife in her original bill and also that of the husband in the cross-bill, one of the questions presented in the decision of the case would be that arising out of the authority and duty of the chancellor to act, as the representative of the public and for the protection of the welfare and morality of society, whether the parties should be divorced or be left in the condition in which their wrongdoing had brought them. If the chancellor should find the charges of extreme and repeated cruelty set forth in the bill and the charge of ²⁹¹ adultery made in the cross-bill to be true, could he render a decree for the wife, the appellant? How could the court determine, when each party had been so proven to be guilty of a breach of the marriage duty, which had the better right to apply for a divorce? It is well settled, the complainant,

who asks a divorce on the ground of extreme and repeated cruelty, should be denied a decree if it appear she has been guilty of adultery: 2 Bishop on Marriage and Divorce, secs. 352, 355, 360; Stewart on Marriage and Divorce, sec. 514; Brown on Divorce, sec. 84; 9 Am. & Eng. Ency. of Law, 2d ed., p. 819.

As we have seen, it would be within the power of the chancellor, acting as the representative of the people, to refuse the wife a decree of divorce if it appeared in the evidence she had committed adultery, though the pleadings presented no such issue. As said by Mr. Bishop (section 314): "A cause [divorce] is never concluded against the judge, and the court may, and to satisfy its conscience sometimes does, of its own motion, go into the inquiry of matters not involved in the pleadings." Is it not, then, aside from all question of defense by recrimination, entirely proper for a defendant in a divorce proceeding to disclose in his answer any matter that it is proper for the chancellor to consider in his capacity as the representative of the public welfare and the morals of society? It is not the policy of the law to favor divorces or to encourage applications for the dissolution of the marriage relation. Why, therefore, should it be declared that a husband, defendant to a bill for divorce, should be denied the right to disclose in his answer that the wife had been guilty of adultery, but should be required to make such charge the basis of a cross-bill for divorce, though he does not want to sever the marriage tie? Such disclosure in an answer would but advise the court as to a matter it had full power to act upon if disclosed on the hearing, though not brought to its notice by the pleadings, and, in addition thereto, would enlighten ²⁹² the complainant and the better enable her to present the proof necessary to satisfy the conscience of the court that she had not been guilty of such a breach of her wifely duty.

It has been held in *Nagel v. Nagel*, 12 Mo. 53, and perhaps in the courts of other jurisdictions, that the court cannot distinguish between matrimonial offenses to which the law attaches the same consequences, and any infraction of the marriage duty which will entitle the injured party to a divorce may be pleaded as a recriminatory defense to a charge of the violation of any other of the marriage obligations which would justify a bill for divorce. Without accepting or rejecting this as the true doctrine, for the reason the question whether every

and any ground of divorce may constitute a recriminatory defense to every other ground is not raised by the record, but only the question whether adultery is a good recriminatory defense to charge of extreme and repeated cruelty, we hold the charge of adultery is a good recriminatory defense to the charge of cruelty in the bill filed by the appellant. It does not follow that each of the grounds specified in the statute for which a divorce may be granted is of equal gravity. From the standpoint of morality, adultery is the more serious of any of the statutory grounds for divorce. The effect produced by adultery, when committed by the wife, may be to introduce into the family circle a spurious offspring and a false heir to divide and share in the patrimony of those of the true blood. Such grave consequences do not attend the other offenses against the marital relation, which affect only the injured party as an individual. Adultery creates a stronger distrust of the affections, and from it arises a greater fear of final total alienation of love of husband for wife or wife for husband. In the same proportion that it shatters and destroys the confidence and affection of husband and wife in a higher degree than any other wrong committed by either, it has the greater²⁹³ tendency to disrupt the marriage relation. It is not in the human heart to so easily forget and forgive it as other delinquencies. It tends to degrade the guilty party and the party injured more greatly in the eyes of mutual friends than other marital wrongs. Public opinion rarely justifies the condonation of the adultery of the wife, and never so readily forgives the condonation as it does that of other marital offenses, and every wife is conscious her social standing will be unpleasantly affected by condonation, on her part, of the adultery of her husband, to a much greater degree than would follow the forgiveness of other violations of the marriage vows. To the same extent that adultery tends more largely to prevent the reconciliation of husband and wife who have become estranged, and to produce permanent destruction of family ties than other acts for which final legal separation may be had, it must be regarded as the greater offense against the marriage relation and the public welfare. These are among the reasons which have caused adultery to become universally recognized among civilized mankind as an offense of more gravity than other violations of the marriage obligations. In a legal aspect, adultery has long been regarded and considered as a wrong to

society and the marriage relation of more consequence than other offenses for which divorces or legal separations may be granted. In *Bast v. Bast*, 82 Ill. 584, we said in substance, that neither a charge of desertion, cruelty, or drunkenness could exonerate the wife from "the more serious charge" of adultery. In *Stiles v. Stiles*, 167 Ill. 576, 47 N. E. 867, we said it is well settled in this state that extreme and repeated cruelty is not sufficient as a recriminatory defense to a charge of adultery. Though a decree for a divorce rendered on any statutory ground will bar the dower of the guilty husband or wife, the mere fact that the surviving husband or wife has been guilty of any of such statutory offenses against the marriage relation other than that of adultery will have no effect to deprive ²⁹⁴ such offender of dower. Adultery accompanied by elopement, however, operates to bar dower by the express provisions of section 15 of chapter 41 of our statutes, entitled "Dower," unless condoned, and no decree of divorce is necessary to effect such forfeiture. Such, also, was the rule at the common law: 2 Blackstone's Commentaries, 136. The doctrine of the ecclesiastical law was, that one who had committed adultery was not entitled to any relief, and that no offense would bar a charge of adultery except adultery on the part of the complainant: Nelson on Divorce, sec. 430.

Whilst there is much conflict in judicial decisions upon the question whether every legal cause of divorce may be availed of as a good recriminatory defense against each and every other of such causes, we are not aware that it has ever been held that adultery is not an effectual bar in recrimination in any instance or against any cause for divorce. In 9 American and English Encyclopedia of Law, second edition, page 819, it is said: "It is well established that adultery of the plaintiff is a defense in recrimination in all cases, regardless of the cause for divorce alleged by the plaintiff or the kind of relief prayed for, whether absolute divorce, a decree a mensa, or alimony without divorce."

The charge in the answer in the case at bar that the appellant had committed adultery was properly held by the chancellor to present, if true, an effectual bar to the prayer of the appellant that a decree of divorce should be awarded to her. The answer was not obnoxious to the exceptions presented against it.

The judgment of the appellate court is affirmed.

RECRIMINATION AS DEFENSE IN DIVORCE PROCEEDINGS.**I. Generally—The Right of Recrimination.****II. Mutuality of Fault.****III. Adultery.**

- a. As Defense to Adultery.
- b. After Suit Brought.
- c. After Desertion.
- d. As Defense to Cruelty.
- e. As Defense to Habitual Drunkenness.
- f. Condoned Adultery as Defense.

IV. Cruelty.

- a. As Defense to Cruelty.
- b. As Defense to Adultery.
- c. As Defense to Desertion.

V. Desertion.

- a. As Defense to Desertion.
- b. As Defense to Adultery.
- c. As Defense to Cruelty.

VI. Physical Incapacity as Defense to Adultery.**I. Generally—The Right of Recrimination.**

The defendant in an action for divorce may allege and prove facts constituting a cause of divorce against the plaintiff in bar of his cause of divorce, and the averment of the facts constituting such recriminatory defense, and the denial thereof, implied in law, creates a material issue, upon which the court must find: *Cassidy v. Cassidy*, 63 Cal. 352; and if defendant establishes recrimination to the satisfaction of the court, the complaint must be dismissed without relief to plaintiff: *Duberstein v. Duberstein*, 171 Ill. 133, 49 N. E. 316; *Palmer v. Palmer*, 29 How. Pr. 390. Recrimination is a valid defense, it seems, in all actions for divorce. "The general doctrine that recrimination is a valid defense, though the divorce is sought upon other grounds than adultery, may, nevertheless, be said, on the very highest authority, to rest in the clearest reason and in exact justice. Unquestionably is this so when the recriminatory fact is of the like character as the act of the defendant, for which the divorce is sought, and more especially must it be so, when the act or conduct upon which the plaintiff's action is founded is induced or occasioned by the act or conduct of the plaintiff, and was in retaliation of it, unless the matter complained of was so grossly in excess of the provocation that it ordinarily cannot be said to have been occasioned by it": *Hale v. Hale*, 47 Tex. 336, 26 Am. Rep. 294. This language was quoted and adopted in the subsequent case of *Trigg v. Trigg* (Tex. Sup. Ct.), 18 S. W. 313, 316, where the court added that "it is the important and the recognized rule that recrimination, as a valid defense, must arise out of the fact that the acts or conduct for

which the plaintiff seeks a divorce were induced by or in retaliation of plaintiff's conduct." The true rule as established by the weight of authority we believe to be that in a suit for divorce on any one of the statutory grounds may be defeated by the allegation and proof in recrimination of the existence of another statutory ground against the plaintiff and in favor of defendant. And such reciprocal causes of action being proved under separate bills, the court should not grant a divorce to either party, but should dismiss the action: *Ribet v. Ribet*, 39 Ala. 348; *Cassidy v. Cassidy*, 63 Cal. 352; *Brenot v. Brenot*, 102 Cal. 294, 36 Pac. 672; *Duberstein v. Duberstein*, 171 Ill. 133, 49 N. E. 316; *Nagel v. Nagel*, 12 Mo. 53; *Church v. Church*, 16 R. I. 667, 19 Atl. 244; *Pease v. Pease*, 72 Wis. 136, 39 N. W. 133; *Hubbard v. Hubbard*, 74 Wis. 650, 43 N. W. 655.

II. Mutuality of Fault.

The general rule is everywhere recognized that as against the cause of action pleaded by plaintiff, the defendant may recriminate by setting up a like cause in reply, and it is also a well-settled principle of law, aside from legislative enactment, that the plaintiff must come into court with a clear conscience, and that if he or she has been guilty of a like violation of matrimonial duties as that of which complaint is made, the complaint must be dismissed and relief denied: *Palmer v. Palmer*, 29 How. Pr. 394. Divorce is a remedy provided for the innocent and injured party alone, and it will not be granted where it appears that the petitioner, although otherwise entitled to a decree, has been guilty of conduct that is cause for a divorce, and such conduct may be set up in recrimination: *Burke v. Burke*, 44 Kan. 307, 21 Am. St. Rep. 283, 24 Pac. 466; *Amy v. Berard*, 49 La. Ann. 897, 22 South. 48; *Morrison v. Morrison*, 62 Mo. App. 299; *Dunbar v. Dunbar*, Wright, 286; *Mattox v. Mattox*, 2 Ohio, 233, 15 Am. Dec. 547; *Hugo v. Hugo*, 21 Pa. Co. Ct. 607; *Mathewson v. Mathewson*, 18 R. I. 456, 49 Am. St. Rep. 782, 28 Atl. 801. "Mutual insults and outrages, the fruit of mutual provocation, unless there be a just and palpable disproportion of guilt as between the parties, furnish no sufficient ground of action to either. We affirm the doctrine announced in a very early case that the law which provides for a separation from bed and board in certain cases is made for the relief of the oppressed party, not for interfering in quarrels where both parties commit reciprocal excesses and outrages": *Amy v. Berard*, 49 La. Ann. 897, 22 South. 48; affirming *Trowbridge v. Carlin*, 12 La. Ann. 882; *Thomas v. Tailleu*, 13 La. Ann. 127.

If the complainant in exhibiting his proofs for divorce discloses the fact that he has himself committed a breach of his marriage vows, he will be denied relief, even if his offense is not pleaded against him, as he has thus shown himself to have unclean hands: *Tracey v. Tracey* (N. J. Eq.), 43 Atl. 713.

The rule that in actions for divorce both parties should be dismissed when guilty of mutual wrongs has its qualifications that the wrongs should be similar in nature and so proportioned in extent as to render it difficult to ascertain which party is mainly at fault, otherwise the divorce must be granted to the one shown to have suffered the much greater wrong: *Thomas v. Tailieu*, 13 La. Ann. 127; *Dillon v. Dillon*, 32 La. Ann. 643; *Machado v. Bonet*, 39 La. Ann. 475, 2 South. 49.

There may, however, be cases under the law authorizing divorce on the ground that the parties cannot live in peace and happiness together, and that their welfare requires their separation, where the parties are mutually at fault, and in which a divorce may be properly granted: *Inskeep v. Inskeep*, 5 Iowa, 205.

Misunderstandings and difficulties between husband and wife, attributable to want of control of temper on both sides, are generally not ground for divorce to either party: *Castanedo v. Fortier*, 84 La. Ann. 135. A bill for divorce is properly dismissed, although the ground alleged is extreme cruelty, if neither party is free from blame, and mutual forbearance would have obviated the differences between the parties: *Stafford v. Stafford*, 53 Mich. 522, 19 N. W. 201. If the cause for divorce alleged is cruelty and inhuman treatment and the cross-bill alleges the same ground, and it is found that both parties are at fault, neither is entitled to a divorce and the action should be dismissed: *Alexander v. Alexander*, 140 Ind. 555, 39 N. E. 855; *Morrison v. Morrison*, 64 Mich. 53, 30 N. W. 903. If a wife files a bill for separate maintenance and her husband a cross-bill for divorce, and it appears that he is a drunken, worthless man, with no property to contribute to the wife's support, and that she has given her husband cause by her improper conduct to gravely complain, there is such mutuality of fault that both bills should be dismissed: *Howard v. Howard*, 47 Ill. App. 453. So, if a husband sues for divorce on the ground of desertion, and in a cross-bill for the same relief, the wife alleges that he has been guilty of such indignities to her person as to render her condition intolerable, no relief can be granted to either if the testimony shows them to be equally at fault: *Cate v. Cate*, 53 Ark. 484, 14 S. W. 675.

In a suit for divorce by a wife on the ground of abandonment and a cross-bill by the husband, it appeared that his abandonment was on account of her cruel and outrageous conduct, and that he had been guilty of culpable neglect of his wife and children resulting in alienating their affections. It was held that neither was entitled to relief, but both should be left where their misconduct to each other had placed them: *Naulet v. Dubois*, 6 La. Ann. 403. A divorce will not be granted upon the ground of cruel and inhuman treatment, where recrimination is pleaded, and it appears that both parties were active in contributing to the injury complained of:

Beckley v. Beckley, 23 Or. 226, 31 Pac. 470. If each of the married parties has committed a matrimonial offense which is a cause for divorce, so that when one asks for this remedy, the other in recrimination is equally entitled thereto, whether the offenses are the same or not, the court can grant the prayer of neither: *Alexander v. Alexander*, 140 Ind. 559, 38 N. E. 855; citing *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717; *Mattox v. Mattox*, 2 Ohio, 234, 15 Am. Dec. 547; *Hale v. Hale*, 47 Tex. 336, 26 Am. Rep. 294; *Wood v. Wood*, 2 Paige, 108.

III. Adultery.

a. **As Defense to Adultery.**—It is a rule of universal application that in reply to an application for divorce on the ground of the adultery of the defendant, he may allege, either by way of recrimination or cross-petition, the commission of adultery by the plaintiff, and if the charge is sustained as to both of the parties, the suit must be dismissed, provided, of course, there has been no condonation. If both parties have a right to divorce, neither has: *Gordon v. Gordon*, 141 Ill. 160, 33 Am. St. Rep. 294, 30 N. E. 446; 41 Ill. App. 137; *Lenning v. Lenning*, 73 Ill. App. 224; *Christianberry v. Christianberry*, 3 Blackf. 202, 25 Am. Dec. 96; *Burke v. Burke*, 44 Kan. 307, 21 Am. St. Rep. 283, 24 Pac. 466; *Fisher v. Fisher*, 93 Md. 298, 48 Atl. 833; *Clapp v. Clapp*, 97 Mass. 531; *Fuller v. Fuller*, 41 N. J. Eq. 198, 3 Atl. 409; *Smith v. Smith*, 4 Paige, 432, 27 Am. Dec. 75; *Lesener v. Lesener*, 31 Barb. 330; *Peck v. Peck*, 44 Hun, 290; *Horne v. Horne*, 72 N. E. 530; *Mattox v. Mattox*, 2 Ohio, 233, 15 Am. Dec. 547; *Rayl v. Rayl* (Tenn., Dec. 1, 1900), 64 S. W. 309. If the party suing for divorce on the ground of adultery is guilty of the same offense the defendant may allege it in his answer, which cannot be stricken out because he is in contempt for failure to pay temporary alimony as ordered by the court: *Gordon v. Gordon*, 141 Ill. 160, 33 Am. St. Rep. 294, 30 N. E. 446. One shown to be guilty of adultery cannot have a divorce for adultery committed by the other, and if adultery by the complainant in a cross-bill is set up in an answer to such cross-bill proof to sustain the charge is admissible, although the charge of adultery made in the original bill has been withdrawn: *Lenning v. Lenning*, 73 Ill. App. 224. A husband cannot maintain a bill for divorce because of his wife's adultery and desertion if it appears that during the period of such desertion he himself committed adultery by marrying another woman and occupying the same house and bed with her for several days: *Clapp v. Clapp*, 97 Mass. 531. If in an action for divorce by a husband on the ground of the adultery of his wife, she sets up the recriminating charge of his adultery, such charge may be sustained on weaker evidence than would be necessary to sustain the suit for adultery as first charged: *Peck v. Peck*, 44 Hun, 290. It has been maintained under the Minnesota statutes, contrary, we

think, to the general trend of decision in the other states, that in an action for divorce upon any other ground for divorce than that of adultery, the adultery of the plaintiff is not a bar to the action, although it may bar alimony: *Buerfening v. Buerfening*, 23 Minn. 563.

b. *After Suit Brought.*—The defendant in an action for divorce on the ground of his adultery may plead as a counterclaim as well as a defense, by supplemental answer, acts of adultery committed by the plaintiff since the commencement of the action, and if he sustains such charge, it is an absolute bar to the right of the wife to a divorce: *Armstrong v. Armstrong*, 27 Ind. 186; *Fuller v. Fuller*, 41 N. J. Eq. 198, 3 Atl. 409; *Blanc v. Blanc*, 67 Hun, 384, 22 N. Y. Supp. 264. The adultery of the party bringing the action either before or after the adultery of the other spouse is a conclusive bar to the action. Hence the adultery of such party at any time before the final decree will bar his or her right to divorce, and such defense may be availed of by supplemental answer: *Fuller v. Fuller*, 41 N. J. Eq. 198, 3 Atl. 409; *Smith v. Smith*, 4 Paige, 432, 27 Am. Dec. 75.

c. *After Desertion.*—There seems to be some conflict in the authorities upon the question whether adultery committed by one of the parties to the marriage after his or her willful desertion by the other, may be set up as a recriminatory defense to an action for divorce on the ground of such desertion. Some of the cases maintain that adultery committed by either husband or wife after their separation is no bar to obtaining a divorce on the ground of such willful and malicious desertion: *Ristine v. Ristine*, 4 Rawle, 459; *Mendenthal v. Mendenthal*, 12 Pa. Sup. Ct. 290; *Leidig v. Leidig*, 13 Pa. Co. Ct. 29. The adultery of a husband after his wife has deserted him for a period of five years without fault on his part during that time is not ground for divorce: *Hall v. Hall*, 4 Allen, 39; and the adultery of a wife after husband has been sentenced to state's prison for the period of five years does not bar her right to divorce: *Handy v. Handy*, 124 Mass. 394. If a wife sues for divorce upon the ground of her husband's adultery, she will not be denied relief on the ground that she has married another man, thereby herself committing adultery, if it appears that such second marriage was contracted ten or fifteen years after she last heard from her first husband, and there is no evidence tending to show that she supposed him to be alive: *Smith v. Smith*, 64 Iowa, 682, 21 N. W. 137. A case similar in almost all respects and decided the contrary way is *Mathewson v. Mathewson*, 18 R. I. 456, 49 Am. St. Rep. 782, 28 Atl. 801. And to the same effect in *Whippen v. Whippen*, 147 Mass. 294, 17 N. E. 644. Adultery by second marriage before divorce may be set up in bar of a divorce for desertion is the ruling in *Peirce v. Peirce*, 160 Mass. 216, 35 N. E. 462. Under the statute allowing divorce only to the injured party, the adultery of a wife

committed after a separation caused by the default of her husband, will not avail him to dissolve the bonds of matrimony: *Tew v. Tew*, 80 N. C. 316, 30 Am. Rep. 84; and the same rule applies to the husband: *Foy v. Foy*, 13 Ired. 90. It has been decided, however, that in an action for divorce brought by a wife against her husband on the ground of his desertion, he may recriminate with a charge of her adultery after the desertion, and if it appears that each party has been guilty of the offense charged, no relief will be granted to either: *Redington v. Redington*, 2 Colo. App. 8, 29 Pac. 811. Also, that if the action is brought on the ground of adultery, the adultery of the other party long after their separation is a bar to relief: *Haines v. Haines*, 62 Tex. 216; misconduct of a wife not actually amounting to adultery may be recriminated in bar to her divorce for the husband's desertion: *Deisler v. Deisler*, 59 App. Div. 207, 69 N. Y. Supp. 326.

d. **As Defense to Cruelty.**—To a libel for divorce on the ground of the cruelty of one of the parties to the marriage, the other may recriminate the adultery of the plaintiff, and if the recriminatory defense is established, no divorce should be granted. This rule rests on the theory that a judicial separation can only be granted when the petitioner comes to the court with a pure character, and is free from all matrimonial misconduct: *Ribet v. Ribet*, 39 Ala. 348; *Brenot v. Brenot*, 102 Cal. 294, 36 Pac. 672; *Johns v. Johns*, 29 Ga. 718; *Crow v. Crow*, 7 N. Y. Civ. Proc. 423; *Doe v. Roe*, 23 Hun, 19; *Shackett v. Shackett*, 49 Vt. 195; *Hubbard v. Hubbard*, 74 Wis. 650, 43 N. W. 655. On the other hand, it has been decided in *Terhune v. Terhune*, 40 How. Pr. 258, and *Henry v. Henry*, 17 Abb. Pr. 411, that in an action by a wife against her husband for a divorce for his cruelty, he cannot set up as a defense her adultery, and the reason given for such decision is that, "to hold otherwise would involve the necessity of conceding that a husband has the right to treat his wife in a cruel and inhuman manner, because she may have been guilty of adultery." Later New York cases, however, expressly refuse to follow such ruling and announce the contrary rule: *Crow v. Crow*, 7 N. Y. Civ. Proc. 423; *Doe v. Roe*, 23 Hun, 19; and in *Shackett v. Shackett*, 49 Vt. 195, the court said that "the ground mainly relied upon and urged for divorce is that for the cause of intolerable severity the adultery committed by her is not a defense. The husband may not lawfully beat his adulterous wife in any way that is regarded by the law as cause for divorce, designated by 'intolerable severity.' If he should break the law in this respect, he would be duly amenable thereto. But whether such adulterous wife may effectually invoke the courts to loose her from the obligations and relations resulting from her matrimonial contract, where she has committed a criminal breach of the contract, depends on other principles and involves different considerations. It suffices to say that upon

principle and authority, adultery of the petitioner is a bar to her having a divorce for any of the causes set forth in the petition": *Shackett v. Shackett*, 49 Vt. 197. If, however, divorce is sought on the ground of cruelty, adulterous intention on the part of the plaintiff will not bar the right, as no conduct on the part of the petitioner not amounting to a statutory ground for divorce is a bar in recrimination: *Rudd v. Rudd*, 66 Vt. 91, 28 Atl. 869.

A late case in North Carolina maintains that if a husband is compelled to leave, and live separate from his wife, on account of her cruelty, it is no defense to an action by him for divorce that he committed adultery after the separation: *Setzer v. Setzer*, 128 N. C. 170, 83 Am. St. Rep. 666, 38 S. E. 731.

e. **As Defense to Habitual Drunkenness.**—If a suit is brought by a husband against his wife for divorce on the ground of habitual drunkenness for more than the statutory period, the wife may recriminate by pleading as a defense the fact that he has been guilty of adultery, and such fact being found, it will prevent him from obtaining a divorce: *Ryan v. Ryan*, 9 Mo. 539.

f. **Condoned Adultery as Defense.**—Adultery committed by one of the parties to the marriage contract and condoned and forgiven by the other for years, or some considerable length of time, should not be held to compel the party whose acts have been condoned to submit without redress to the faithlessness and unrestrained profligacy of the other. Hence condoned adultery cannot be set up as a defense in recrimination of a charge of adultery alleged as a cause for divorce when the latter has not been condoned: *Cumming v. Cumming*, 135 Mass. 386, 46 Am. Rep. 476; *Jones v. Jones*, 18 N. J. Eq. 33, 90 Am. Dec. 607, and note 611; *Wood v. Wood*, 2 Paige, 109; *Morrell v. Morrell*, 1 Barb. 318; *Bleck v. Bleck*, 27 Hun, 296.

IV. Cruelty.

a. **As Defense to Cruelty.**—A defendant charged with extreme and repeated cruelty, or with cruel and inhuman treatment, as ground for divorce may recriminate and plead in defense that the complainant was equally cruel, and if such defense is shown by the proof, neither party is entitled to a divorce, on the principle that divorce is relief granted only to the injured and innocent spouse: *Cassidy v. Cassidy*, 63 Cal. 352; *Duberstein v. Duberstein*, 171 Ill. 133, 49 N. E. 316; *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855; *Lawlor v. Lawlor*, 76 Mo. App. 637; *Van Veghten v. Van Veghten*, 4 Johns. Ch. 501; *Wheeler v. Wheeler*, 18 Or. 261, 24 Pac. 900. If a wife sues for divorce on the ground of cruel treatment, and the evidence shows that both she and her husband had frequent altercations, and that, at least on one occasion, she beat and bruised him in a severe manner, there is such recrimination as prevents her from obtaining a divorce. "The cruelty must

not approach to mutuality, nor be exercised sometimes by one and sometimes by the other, though differing somewhat in degree. If the recrimination on the part of the injured spouse is insignificant compared with the great provocation on the part of the other, a divorce may be granted"; otherwise not: *Beck v. Beck*, 68 Tex. 35.

Cases may arise in which a counter-charge of cruelty is not a good recriminatory defense. Thus in *Prather v. Prather*, 99 Iowa, 893, 68 N. W. 806, it appeared that both husband and wife had been guilty of using violent and abusive language to each other, and had, on certain occasions, resorted to blows, but it also appeared that her conduct was in a measure, at least, induced by the fact that she had seen her husband having sexual intercourse with a cow, and the court determined that, under such circumstances, she was entitled to a divorce. A sudden act of retaliation by the plaintiff, provoked by the cruel treatment of the defendant, does not defeat the action when repeated cruel acts of the defendant, constituting ground for divorce, have been shown: *Griesedieck v. Griesedieck*, 56 Mo. App. 94. If a wife by words and blows provokes her husband to counter-acts of the same character not disproportioned to the provocation, she cannot obtain a divorce on the ground of his extreme cruelty, and the state of her mental condition will not relieve her, provided it is not such as to deprive her of power to desist from such conduct: *Duvale v. Duvale* (N. J. Eq.), 34 Atl. 888.

b. **As Defense to Adultery.**—Allegations in an answer to a bill for divorce on the ground of adultery charging cruelty are generally deemed a good recriminatory defense, which, if sustained, bars the right to any relief for the plaintiff: *Brenot v. Brenot*, 102 Cal. 294, 36 Pac. 672; *Nagel v. Nagel*, 12 Mo. 53; *Reading v. Reading* (N. J. Eq., Sept. 18, 1886), 5 Atl. 721; *Church v. Church*, 16 R. I. 667, 19 Atl. 244; *Pease v. Pease*, 72 Wis. 136, 39 N. W. 133. It has, however, been maintained in *Stiles v. Stiles*, 167 Ill. 576, 47 N. E. 867, and *Griffin v. Griffin*, 23 How. Pr. 183, that extreme and repeated cruelty on the part of the complainant is not a sufficient recriminatory defense to a bill for divorce charging the defendant with adultery.

c. **As Defense to Desertion.**—In those states, at least, where the rule prevails that, in reply to an application for divorce, the defendant may allege, either by way of recrimination or cross-petition, the commission by the plaintiff of any offense that by statute is made a cause for divorce, the defendant, as against a petition for divorce on the ground of desertion without justifiable cause, or willfully, may allege in recrimination the cruelty of the plaintiff causing such desertion, and if such defense is sustained, it is within the discretion of the court either to dismiss the bill or grant the divorce to the party most injured: *Shores v. Shores*, 23 Ind. 546; *Warner v. Warner*, 54 Mich. 492, 20 N. W. 557; *Hoff-*

man v. Hoffman, 43 Mo. 547; Graecen v. Graecen, 2 N. J. Eq. 459; Harvey v. Harvey (N. J. Eq., Jan. 22, 1887), 7 Atl. 871.

V. Desertion.

a. **As Defense to Desertion.**—While it is questionable whether husband and wife can each of them, at one and the same time, be guilty of willful desertion of the other, "yet if this were not so, then the doctrine of recrimination would apply, and when it appeared, as it is recited to appear in the decree complained of, that both were in a measure guilty of desertion of the other, neither would be entitled to a divorce, for neither would have the prerequisite of clean hands, and both would be barred": Wass v. Wass, 41 W. Va. 126-130, 23 S. E. 537. To the same effect: Warner v. Warner, 54 Mich. 492, 20 N. W. 557; Test v. Test, 19 N. J. Eq. 342. Desertion by a wife caused by her husband prohibiting her from seeing or communicating with her mother, and his informing her that she could not go with him if she wanted to see or communicate with her mother, is not a good recriminatory defense to her action for divorce on the ground of his desertion: Williams v. Williams, 130 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. 98.

b. **As Defense to Adultery.**—It is well established and everywhere admitted that desertion on the part of the plaintiff is not a good recriminatory defense to an action for divorce on the ground of adultery. Or, in other words, desertion, set up by way of recrimination, is not an answer to a bill for divorce charging adultery: Richardson v. Richardson, 4 Port. 467, 80 Am. Dec. 538; Bast v. Bast, 82 Ill. 584, 25 Am. Rep. 341; Huling v. Huling, 38 Ill. App. 144. Desertion is not a defense to an action for divorce on the ground of adultery, especially when it has not been so long continued as to constitute of itself a ground for divorce: Dupont v. Dupont, 10 Iowa, 112, 74 Am. Dec. 378; Wilson v. Wilson, 40 Iowa, 230; Hall v. Hall, 4 Allen, 39; Walker v. Walker, 172 Mass. 82, 51 N. E. 455. Conduct of a husband which might have justified his wife in deserting him, but was not a ground for divorce, is not a bar to his obtaining a divorce for her adultery: Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847.

c. **As Defense to Cruelty.**—The fact that a wife has deserted and abandoned her husband is not a counterclaim available to him, if it appears that her abandonment was caused by his cruel and inhuman treatment of her: Fitzpatrick v. Fitzpatrick, 21 N. Y. Misc. Rep. 378, 47 N. Y. Supp. 737. In an action by a wife for divorce on the ground of cruelty offers of reconciliation and support by her husband if she will return to him are not a sufficient bar to her action: Dickenson v. Dickenson, 1 Del. Co. Rep. 293. In such an action a notice to the wife, given by her husband after suit brought to return to him, is of no avail to him in defending the suit: Graecen v. Graecen, 2 N. J. Eq. 459.

VI. Physical Incapacity as Defense to Adultery.

In an action for divorce on the ground of adultery, the defendant cannot interpose the defense of physical incapacity of the plaintiff to contract the marriage relation, especially where more than two years have expired from the time of the marriage and within which time the defendant has brought no action against the plaintiff to dissolve the marriage contract on the ground of incapacity to enter into it: *Griffin v. Griffin*, 23 How. Pr. 183.

EGAN v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

[193 Ill. 295, 61 N. E. 1081.]

INSURANCE, MARINE—PART INSURANCE.—If a vessel is insured for a part only of its value, the owner is a coinsurer as to the uninsured part, and in case of loss to that part, which is called the owner's risk, it must be taken into consideration in fixing the proportion of their loss to be paid by the insurers. (p. 343.)

INSURANCE—RIGHT OF SUBROGATION.—If an insurer pays a loss which is due to the wrongful act of another, he is subrogated to the rights of the insured and may in the name of the latter prosecute a suit against the wrongdoer and reimburse himself. (p. 344.)

INSURANCE, MARINE—RIGHT OF INSURER TO SHARE IN RECOVERY.—Although the insurer of a vessel does not participate in a libel against another vessel causing the loss commenced by the insured without notice to the insurer or request that he become a party to the proceeding, he does not thereby waive his right to his share of the amount recovered in the libel suit. (p. 344.)

C. E. Kremer, for the appellant.

Church, McMurdy & Sherman, for the appellee.

299 RICKS, J. The suit was in assumpsit for money had and received by appellee for the use of appellant. The plea was the general issue. The libel against the "Marion" was brought by the owners of the "Armour" without in any manner consulting or asking the co-operation of the insurers of the hull. The insurance on the cargo was to the three partners of the "Armour," and the insurers and insured had a common interest in the recovery, but the insurance of appellant was his individual affair, which may, to some extent, account for the readiness of all the cargo insurers to become participants in the libel. There is no evidence at all that any of these

insurers, either on the ³⁰⁰ cargo or the hull, were consulted or advised of the intention of the owners of the "Armour" to prosecute a libel against the "Marion," until some time after the suit had in fact been brought, and there is no evidence tending to show that appellee was ever, at any time, requested to become in any way active, either as a party or by contribution, or in any other manner, in the prosecution of the libel.

Appellant insists that the case of *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382, 10 Am. Rep. 746, is directly in point and fully sustains his contention. In that case, on page 386, among the findings of facts, are the following: "That the defendant in error [the insurance company] was not a party to said suit; that it expressly declined and refused, on request, to contribute to or in any manner aid in its prosecution," and so the court holds it would be unconscionable to ward any part of it to the defendant in error, who refused to hazard the costs of its recovery. If appellee had been requested to become a party to the suit, or had been requested to contribute to its prosecution and had refused to do so, then the cases would be analogous, but without that they are not, and we do not regard the case as supporting the contention of appellant. Appellant elected to prosecute this suit with his co-owners without regard to the action of appellee, and saw fit to make an agreement with those holding insurance on the cargo by which they were to receive back, from what they recovered from the "Marion," an amount in proportion to what they paid to the total value of the vessel and cargo. They did this, and what was left was received by the owners in equal parts on account of loss to the hull, which was the property covered by appellee's policy.

The law applicable to marine insurance is of very early origin, and its principles, in those localities where it is called into operation, are well understood. It is too firmly established to now be questioned that when a vessel ³⁰¹ is insured for a part, only, of its value, the owner is held to be a coinsurer as to such uninsured part, and in case of loss that part which is uninsured, and is called the owner's risk, is taken into consideration in fixing the proportion of their loss to be paid by the insurers: *Parsons on Mercantile Law*, 2d ed., 537; 2 *Parsons on Marine Insurance*, 405; *Angell on Fire and Life Insurance*, sec. 249; *Trull v. Roxbury Ins. Co.*, 3 Cush. 263; *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297; *North of England Ins. Assn. v. Armstrong*, L. R. 5 Q. B. 244. In this case, the policy being a valued policy—that is, the property insured

being placed at an arbitrary value of \$100,000 and appellant's interest being one-third of that amount—and his insurance on his interest being to the amount of \$30,000, he was, by the above rule, a coinsurer of his interest to the extent of \$3,333.33, which was properly taken into consideration in determining the proportionate amount to be paid by appellee on his loss under the \$7,500 policy. By this rule appellee had paid its full proportion of appellant's loss on the hull of this vessel, and by its contract with appellant it was agreed "that in case of any loss or damage under this policy, the insured, in accepting payment therefor, hereunder, hereby, and by that act assigns and transfers all his, its, or their right to recover for such loss or damage against any such person, persons or corporation to this company, to inure to its benefit, but to the extent only of the amount of such loss or damage and the attendant expenses of recovery paid or incurred by this company; and any act of the insured waiving or transferring, or tending to defeat or decrease, any such right of recovery against any person, persons, or corporation shall be a cancellation of the liability of this company for or on account of such loss or damage." As his net share, after deducting all the expenses of the litigation, which amounted to more than the net amount collected, appellant received from the "Marion" \$5,020.65, and the question arises whether, under the law and the contract ³⁰² between the parties, appellee is entitled to any portion of that amount.

As a rule applicable to inland as well as marine insurance, it is now well established that if an insurer pays a loss which is due to the wrongful act of another, the insurer is subrogated to the rights of the insured, and may, in the name of the assured, for his use, prosecute a suit against the wrongdoer and reimburse himself: *North of England Ins. Assn. v. Armstrong*, L. R. 5 Q. B. 244; *Hart v. Western R. R. Co.*, 13 Met. 99, 46 Am. Dec. 719; *Hall v. Railroad Co.*, 13 Wall. 367; *Mobile etc. R. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566; *Phoenix Ins. Co. v. Erie etc. Trans. Co.*, 117 U. S. 312, 6 Sup. Ct. Rep. 750; *Chicago etc. R. Co. v. Glenny*, 175 Ill. 238, 51 N. E. 896. So that under this rule the appellee would be entitled to recover without relying upon the provisions of the contract between the parties. In this case, however, appellant expressly contracted and agreed to assign to appellee all his right of action against the wrongdoer causing the loss; and in the case of "The Potomac," 105 U. S. 630, where the owners

of the "Lee" had filed a libel against the "Phoenix" for loss due to her fault, a release by the insurers to the extent of their proportionate share was held a good defense as against the libellant *pro tanto*. In the policy in question was the further provision: "The expenses of recovery (if any) paid or incurred by the said company shall be a lien upon and shall be recoverable against the said vessel, tackle, apparel, and other furniture, or any part thereof, or against the insured, at the option of the insurer." Under this clause of the contract there can be little question that if appellee had prosecuted a suit and recovered less than its costs, expenses, and a sum sufficient to indemnify itself for the amount of loss paid, appellant would have been liable for the deficit—to the extent, at least, of costs and expenses. Such being its contract, we are unable to understand upon what principle of law or equity appellant can now insist, after being allowed to deduct all the expenses, which were ²⁰⁸ enormous, from the amount collected, and only asked to account for the proportionate share of the net amount left, that it is inequitable or unfair that appellee should be accorded this remedy.

Appellant says, however, that with all the amounts that he did collect he is still a loser of more than \$2,000, and that therefore appellee should not be allowed any part of the amount collected from the "Marion." Appellant seems to overlook another one of his agreements, in which it is stipulated that "in the event that the insurers pay any loss or damage under this policy, caused by the negligence, carelessness, or misconduct of a third party, the valuation of the vessel expressed in this policy shall be considered the value in adjusting the respective claims of the insurers and insured in any moneys paid by or recovered from such third party." His total net loss on the hull was \$24,636.69. On this he received from the insurance companies \$22,173.03, and adding to it the ten per cent which he carried at his own risk (\$2,463.66), and adding to this the \$5,020.66 that he received from the "Marion," and he has for his loss \$29,657.35; or, deducting the portion that he carried at his own risk, and he would still have \$27,193.69, or \$2,557 more than he lost, without any risk on his own part. Appellee only seeks to recover, and has only recovered, from this surplus fund arising from the "Marion," a share in proportion to what it paid bore to the whole insurance on the hull, and under the terms of the

contract and the law applicable to such insurance we regard the judgment as a correct legal conclusion.

The propositions of law were properly refused.

The judgment of the appellate court is affirmed.

The Right of an Insurer to Subrogation is discussed in the monographic note to *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 44 Am. St. Rep. 731-739. Contracts of marine and fire insurance are essentially contracts of indemnity. If the insured recovers the amount of his loss from any source, the insurer may recover from him pro tanto: *Packman v. German Fire Ins. Co.*, 91 Md. 515, 80 Am. St. Rep. 461, 46 Atl. 1066. An insurer, after paying a loss incurred by the insured, is subrogated to all the rights of the latter against the one whose tortious act caused the loss: *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 41 S. C. 408, 44 Am. St. Rep. 725, 19 S. E. 858.

UNION STRAWBOARD COMPANY v. BONFIELD.

[193 Ill. 420, 61 N. E. 1038.]

CONTRACTS IN RESTRAINT OF TRADE.—A contract by which a person agrees not to engage in a particular business within the state, "or anywhere else, where so doing may conflict with the business interests or diminish or lessen the profits" of the purchaser, is null and void and against public policy. (p. 349.)

CONTRACTS IN PARTIAL RESTRAINT OF TRADE are valid if founded upon a good consideration and if they afford only reasonable protection to the interests of the parties in whose favor the restraint is imposed, and the prohibited area is reasonable, so as not to be injurious to the interests of the public and against public policy. (p. 350.)

PUBLIC POLICY.—WITHIN THEIR OWN SPHERE STATES have a public policy as separate commonwealths, which the courts of each state regard and enforce, distinct from questions of policy affecting the nation at large. (p. 350.)

CONTRACTS IN RESTRAINT OF TRADE.—IT IS AGAINST STATE POLICY that its citizens shall not have the privilege of pursuing their lawful occupations at some place within its borders, and that a citizen shall be compelled to leave the state to engage in his business and to support himself and family. (p. 350.)

CONTRACTS IN RESTRAINT OF TRADE MAY BE VALID which embrace, within reasonable limits, parts of different states, but such contracts, when they apply to the whole state, are void and cannot be enforced. (p. 350.)

W. R. Hunter and O. P. Benney, for the appellant.

H. K. and H. H. Wheeler, T. P. Bonfield and Paddock & Cooper, for the appellee.

⁴²² CARTWRIGHT, J. The circuit court of Kankakee county sustained the demurrer of appellee to the declaration of appellant in an action of covenant brought in that court, and, the plaintiff electing to stand by its declaration, judgment was entered against it for costs. On appeal to the appellate court for the second district the judgment was affirmed, and this further appeal was prosecuted.

The declaration contains three counts, in each of which it is alleged that the defendant and others, on September 1, 1887, for a valuable consideration, made, executed, and delivered to the Union Strawboard Company an instrument in writing under their hands and seals, set out in the first count in hæc verba, as follows:

"Whereas, the Union Strawboard Company, a corporation under the laws of Ohio, has purchased, paying therefor the sum of \$50,000, the paper-mill of the Kankakee Paper Company, located at Kankakee, Kankakee county, in the state of Illinois, together with all the leasehold interest, rights, appurtenances, and fixtures of said paper-mill, together with the goodwill of said The Kankakee Paper Company in the manufacture and sale of sheet strawboard, rolled strawboard, wood pulpboard, pulp-lined board, wrapping paper, and other similar kinds of ⁴²³ boards and papers; and whereas, said The Union Strawboard Company would not have purchased said paper-mill without this agreement on our part; and whereas, we, the undersigned, are the owners and proprietors of the said Kankakee paper-mill and receive the profits and proceeds of this sale:

"Now, therefore, we, as a part consideration for the payment of said sum of \$50,000, and as an inducement to said The Union Strawboard Company to pay said sum of money, do hereby covenant and agree to and with said The Union Strawboard Company that we shall not and will not, for the term of twenty-five years from the date hereof, directly or indirectly, engage in or be interested in the manufacture or sale of sheet strawboard, rolled strawboard, wood pulpboard, pulp-lined board, wrapping paper, or any other kind of boards or paper which will interfere with the sale and consumption of said above described board and papers, in the state of Illinois, or anywhere else where so doing may conflict with the business interests or diminish or lessen the profits of said The Union Strawboard Company in the manufacture and sale of said above-described boards and papers, nor will we aid, encourage,

or assist any other person or persons, firm, or corporation so to do; and the sum of \$50,000, to be recovered by and paid to said The Union Strawboard Company, is hereby fixed and agreed upon as and for liquidated damages, to the payment of which said sum of \$50,000 well and truly to be made to said The Union Strawboard Company, its successors or assigns, we do hereby bind ourselves, our heirs, executors, and administrators, firmly by this contract in case of any violation of this contract by us, each one being responsible only for his own acts.

"In witness whereof we have hereunto set our hands and seals this — day of September, A. D. 1887.

"F. CRAWFORD.	[Seal]
"W. BONFIELD.	[Seal]
"MARY E. MITCHELL.	[Seal]
"ABBIE L. HAMBLIN.	[Seal]
"FANNIE AHRENS.	[Seal]
"MARY J. HAMBLIN.	[Seal.]

In the second count a covenant not to engage in the business in the state of Illinois for a term of twenty-five years was set forth in general terms, and the instrument was made a part of the third count as set forth in *hæc verba* in the first count. Each count averred that on February ⁴²⁴ 1, 1890, the said Union Strawboard Company, to whom the instrument was made, for a valuable consideration sold, assigned, and transferred to the American Strawboard Company all its rights, titles, and interests in and to said instrument and all rights secured thereby. The first count alleges that on January 1, 1893, and from thence hitherto, said American Strawboard Company has been engaged in the business of manufacturing and selling in the state of Illinois the strawboards and papers mentioned in the covenant, and the third avers that said American Strawboard Company, during said period, has been engaged in manufacturing and selling said strawboards and papers in the state of Illinois and throughout the United States of America, except certain states and territories excepted, as hereinafter stated. The breach alleged in the first count is, that the defendant has engaged and become interested in the manufacture and sale of strawboards and paper in the state of Illinois, and encouraged and assisted other persons named to manufacture and sell the same in said state, thereby interfering with the sale and consumption of said strawboards and papers in said state, and by reason of the premises the business

interests of said American Strawboard Company are impaired and the profits of its business in said state greatly lessened and diminished. The breach alleged in the second count is, in general terms, that the defendant has not kept his covenant, but has broken the same. The breach alleged in the third count is, that defendant has engaged and become interested in the manufacture and sale of strawboards and papers in the state of Illinois, and elsewhere in all states and territories within the confines of the United States of America, except the territories of Alaska, Arizona, Indian, and New Mexico, and the states of Utah, Colorado, Idaho, and North Dakota, in conflict with the business interests of the plaintiff, for the use of the American Strawboard Company, and by reason of the premises the business ⁴²⁵ interests of said plaintiff, for the use of said American Strawboard Company, have been and are impaired, and the profits of the said business greatly lessened and diminished.

The covenant sought to be enforced in this action is, that the defendant will not, for a term of twenty-five years, engage or be interested in the manufacture or sale of certain kinds of strawboard, boards, and papers, or any other kind of boards or paper which will interfere with the sale and consumption of such boards and papers, in the state of Illinois or elsewhere, when so doing may conflict with the business interests or diminish or lessen the profits of the Union Strawboard Company in the manufacture and sale of said boards and papers. Passing by all questions concerning the declaration as to the covenant extending to the American Strawboard Company or the assignment to that corporation, and the interference with and diminishing and lessening the profits of the assignee of the contract, we will address ourselves directly to the question whether the contract is one upon which an action can be maintained under the averments of any count of the declaration.

The contract prohibits the defendant from engaging in the specified business in this state or country, or in any other, where so doing could interfere with the profits or business interests of the Union Strawboard Company, so that the corporation may prevent him from doing business anywhere. It provides that, so far as the defendant is concerned, the specified business shall be in the hands of the Union Strawboard Company wherever it may elect to do business, and that there shall be no competition with it anywhere on his part. He is not to

do business in this state, and if the Union Strawboard Company chooses to engage in business in any other state he must not go into business there or must quit his business. He is left at liberty to engage in the business only in places where the Union Strawboard Company does not choose ⁴²⁶ to do business. Such a contract is void, as against public policy. The courts will not enforce any contract which excludes a party, generally, from following any lawful trade or business beneficial to the community and to him: *Lanzit v. Sefton Mfg. Co.*, 184 Ill. 326, 75 Am. St. Rep. 171, 56 N. E. 393. Among the reasons for this rule which have been assigned are, that such a contract interferes with the ability of the citizen to support himself and his family, discourages industry and enterprise beneficial to the public, prevents competition and exposes the public to the evils of monopoly.

It is insisted, however, that the contract is divisible, and, the alleged violation being limited in the first and second counts to the state of Illinois, is valid and binding within the state. A contract in partial restraint of trade is valid provided it is founded upon a good consideration, and only affords a reasonable protection to the interests of the party in whose favor it is imposed, and the prohibited area is reasonable, so as not to be injurious to the interests of the public and against public policy: *Linn v. Sigsbee*, 67 Ill. 75; *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735. It is not sufficient that there is a good consideration, for that is necessary to any contract; nor is it sufficient that the restraint is no greater than necessary to secure the intended benefits to the opposite party. As we said in *Lanzit v. Sefton Mfg. Co.*, 184 Ill. 332, 75 Am. St. Rep. 176, 56 N. E. 395: "If such were not the rule, then the mere magnitude of the business and trade involved in the contract would determine its validity, overriding all questions affecting the public welfare." The fact that engaging in business might interfere with the business or injure or lessen the profits of the Union Strawboard Company makes no difference, if the contract is against public policy. The restrictions imposed by this contract are probably no greater than necessary to prevent competition with the Union Strawboard Company in its business; but that is not the only test of its validity. If it should be conceded that the contract is divisible, the question then is, under this declaration, ⁴²⁷ whether it can be enforced as to the entire state of Illinois. Counsel contend that it is valid

to that extent, at least, and that the rule stated on that subject in the cases above cited should not be adhered to. The reason for the rule is, that it is against the policy of the state that the people of the whole state should be deprived of the industry and skill of a party in an employment useful to the public, and he should be compelled either to engage in other business or abandon his citizenship of the state and remove elsewhere in order to support himself and family. The argument is, that a contract, to be in general restraint of trade, must extend to the entire realm of the United States, which would not be deprived of the industry of the citizen or of his citizenship, unless he must go to a foreign country. Within its own sphere the state has a public policy as a commonwealth, which the courts of the state regard and enforce, distinct from questions of policy affecting the nation at large. The state regulates its internal affairs, supports those who become public charges, and is interested in the industries of its citizens. It is against the policy of the state that its citizens should not have the privilege of pursuing their lawful occupations at some place within its borders, and that a citizen should be compelled to leave the state to engage in his business and to support himself and family. It is true that a contract may be valid which embraces portions of more than one state. Trade and business are not affected by state lines, and a contract might be good in restraint of trade which embraced, within reasonable limits, parts of different states, but an agreement which applies to the whole state is void, and cannot be enforced.

The judgment of the appellate court is affirmed.

Contracts in Restraint of Trade are not necessarily void by reason of universality of time or space. Their validity depends upon their reasonableness: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 49 Am. St. Rep. 784, 28 Atl. 973. Contracts in general restraint of trade are void as against public policy; but contracts in partial restraint of trade are valid and enforceable, if reasonable and supported by a good consideration: *Lanzit v. Sefton Mfg. Co.*, 184 Ill. 326, 75 Am. St. Rep. 171, 56 N. E. 393; *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723. A contract in partial restraint of trade and confined to a limited territory may be unlawful: *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894, 29 Atl. 102. See, too, *Clark v. Needham*, 125 Mich. 84, 84 Am. St. Rep. 559, 83 N. W. 1027. An agreement, entered into at the time a business is sold, not to engage in that business in the state for twenty-five years is void: *Lufkin Rule Co. v. Fringell*, 57 Ohio St. 596, 63 Am. St. Rep. 736, 49 N. E. 1030. So is a contract not to engage in the business in that state and in another one: *Lanzit v. Sefton Mfg. Co.*, 184 Ill. 326, 75

Am. St. Rep. 171, 56 N. E. 393. But see *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212; note to *Angler v. Weber*, 92 Am. Dec. 755.

Unlawful Trusts and trade combinations are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273.

FROST v. PEOPLE.

[193 Ill. 635, 61 N. E. 1054.]

SEARCH-WARRANTS—DESCRIPTION OF PROPERTY.—

A search-warrant commanding the seizure of "gambling implements and apparatus used, kept, and provided to be used in unlawful gambling" on certain premises and in a certain building, is sufficiently definite in its description of the property to be seized. (p. 354.)

CONSTITUTIONAL LAW—TRIAL BY JURY—DESTRUCTION OF GAMBLING APPARATUS.—Trial by jury is not a right in summary proceedings, and no constitutional right is violated by providing that gambling implements and apparatus shall be destroyed, after a summary hearing, under the direction of the court. (p. 354.)

CONSTITUTIONAL LAW — DESTRUCTION OF GAMBLING APPARATUS.—A statute providing for searches and seizures of gambling apparatus or implements, and that the thing seized shall be burned or otherwise destroyed under the direction of the court, does not violate any constitutional right or deprive anyone of property without due process of law. (p. 354.)

CONSTITUTIONAL LAW—SEIZURE AND DESTRUCTION OF GAMBLING APPARATUS—PROPERTY RIGHTS.—If a statute declares that gambling implements and apparatus are pernicious and dangerous to the public welfare and that the keeping of them is a criminal offense, they are not thereafter lawful subjects of property which the law protects, and are liable to seizure and destruction without violating any constitutional rights of property, whether they are in use when seized or not. (p. 354.)

Andrews & Vanse, for the appellant.

H. J. Hamlin, attorney general, E. S. Smith, B. D. Monroe, and G. B. Gillespie, for the appellee.

637 CARTWRIGHT, J. Upon complaint in writing, verified by affidavit, a search-warrant was issued by the judge of the city court of the city of Mattoon commanding a search of the building numbered 1816 and 1818 West Broadway, in said city, for gaming apparatus and implements used, kept, and provided to be used in unlawful gaming, and directing the arrest of Jerome Dunn, in whose possession said gaming apparatus and implements were alleged to be. The war-

rant was returned by the sheriff executed by seizing the following chattels found on the second floor of said building, to wit: "About two thousand five hundred chips, four poker tables, one stud-poker table, three crap tables, one long table, three packs cards, one faro table and lay-out, two hundred and sixty dice, one roulette wheel and table, one desk, eighteen chairs, one office chair, four stools," and also by arresting the said Jerome Dunn. Plaintiff in error appeared upon the return of the warrant and was allowed to interplead, and entered his motion to quash the writ and return for the ~~638~~ reason that the affidavit upon which the writ was issued did not particularly describe the property to be taken under the search-warrant. The motion was overruled and he excepted. He then filed his intervening petition, claiming to be the owner of the property found in the rooms on the second floor of No. 1816, and alleging that the implements and apparatus were not used for gaming at the time they were seized, but were stored in the room and were "knocked down" and not in condition for use. On the hearing of the cause he demanded a jury to try the issues, which was refused by the court, and he excepted. The cause was heard in a summary way by the court, and as to the property claimed by plaintiff in error the court made a finding that the property found in the rooms on the second floor of No. 1816, viz., two crap tables, one faro lay-out, and one roulette wheel and table, were gaming implements and had no value or use for any other purpose, and the same were condemned and ordered destroyed. The rest of the chattels found in said rooms on the second floor of 1816 the court found were not in actual use for gaming purposes, and being of value for other purposes it was ordered that they be returned to plaintiff in error. The writ of error in this case was sued out to review the judgment against the property ordered to be destroyed.

The judgment being in favor of plaintiff in error except as to the two crap tables, one faro lay-out, and one roulette wheel and table, which the evidence showed to be purely gambling apparatus and implements and to have no value or use for any other purpose, the only questions to be considered relate to the alleged errors in seizing them and rendering judgment against them.

The first question relates to the ruling of the court in refusing to quash the writ and return. The complaint charged that the second floor of the building was a place resorted to for

unlawful gaming, and that gaming implements and apparatus were concealed on said second floor ⁶³⁹ of said building occupied by Jerome Dunn. The writ followed the complaint, and the objection made was, that the description of the property to be searched for was not sufficiently definite and particular. The statute authorizes searches for gaming apparatus or implements, and it would not be sufficient to describe the property as goods, wares, and merchandise, or as chattels generally. The description must be so particular that the officer charged with the execution of the warrant will be left with no discretion respecting the property to be taken. But we regard the description in this case as sufficiently definite. It includes only apparatus or implements generally used in gambling for staking or hazarding money or other valuable thing to be won or lost. In the case of stolen property or specific articles which can be readily described, great particularity is called for; but there might be much difficulty in giving a particular description of the various gambling devices, and we think more latitude should be allowed in the description. Under the warrant the officer could not take goods or chattels generally found in the premises, but only apparatus and implements for gaming.

The next alleged error is denying the plaintiff in error a trial by jury. The right to such a trial in the classes of cases in which it was enjoyed before the adoption of the constitution is preserved inviolate by that instrument, but in all other cases the legislature may provide for a hearing or trial without a jury: *Ross v. Irving*, 14 Ill. 171; *Commercial Ins. Co. v. Scammon*, 123 Ill. 601, 14 N. E. 666; *City of Spring Valley v. Coal Co.*, 173 Ill. 497, 50 N. E. 1067. This case does not belong to any class in which plaintiff in error would have had a right to trial by jury before the adoption of the constitution. Trial by jury was never a right in summary proceedings, and the legislature did not violate the constitution by providing that gaming implements and apparatus should be destroyed, after a hearing, under the direction of the judge, justice, or court.

⁶⁴⁰ Plaintiff in error says that the implements and apparatus in question were not in use for gambling when seized, and that the only statute making it an offense to have such property in his possession is the act in force June 21, 1895, prohibiting the keeping of any clock, joker, tape, or slot-machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the

result of which money or other valuable thing is staked, bet, hazarded, won, or lost: Laws of 1895, p. 156. He claims that section 2 of that act, providing for the destruction of such gambling devices, is unconstitutional and void, for the reason that it provides no way of determining the character of the property, but delegates judicial authority to municipal or other local authorities to determine that question and destroy the property, and that as this proceeding must be under that section the judgment is unauthorized. Division 8 of the Criminal Code provides for searches and seizures of gaming apparatus or implements, and that the thing seized shall be burned or otherwise destroyed under the direction of the judge, justice, or court. In *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322, it was insisted that section 2 of said act of 1895 was unconstitutional for the reason here alleged. The section relating to the destruction of the property was not involved in that case, but in reply to the argument we said that proper proceedings to enforce the section could be had under the general provisions in relation to searches and seizures found in division 8 of the Criminal Code. We adhere to the opinion then expressed. The proceeding under division 8 does not violate any constitutional provision or deprive anyone of property without due process of law. The legislature have determined that gambling implements and apparatus are pernicious and dangerous to the public welfare, and the keeping of them is an offense prohibited by law. They are, therefore, not lawful subjects of property which the law protects, but have ⁶⁴¹ ceased to be regarded or treated as property, and are liable to seizure, forfeiture, and destruction without violating any constitutional provision: *Glennon v. Britton*, 155 Ill. 232, 40 N. E. 594. The evidence fully justified the conclusions of the court that the property condemned and ordered to be destroyed had no value or use for any other purpose than that of gambling, and there is no error in the record which calls for a reversal of the judgment.

The judgment is affirmed.

A Search-warrant, to be valid, must particularly describe the goods to be searched for and the places to be searched: *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Reed v. Rice*, 2 J. J. Marsh. 44, 19 Am. Dec. 122.

Gambling Apparatus.—A statute is unconstitutional which authorizes the police to seize gambling tables and devices used for gambling, and makes it the duty of the president of the police to cause them to be publicly destroyed. This could be done without

notice to the owner or any semblance of a judicial investigation: *Lowry v. Rainwater*, 70 Mo. 152. 35 Am. Rep. 420. But it is held in *Board of Police Commrs. v. Wagner*, 93 Md. 182, post, p. 423, 48 Atl. 455, that an implement insusceptible of being put to any legitimate use and designed to be used for violating the gambling laws of the state, is subject to summary seizure and detention under the police power of the state.

CASES
IN THE
SUPREME COURT
OF
IOWA.

**STATE v. OMAHA AND COUNCIL BLUFFS RAILWAY
AND BRIDGE COMPANY.**

[113 Iowa, 80, 84 N. W. 983.]

MUNICIPAL ORDINANCE.—THE TERM “BY-LAW” as used in the Iowa code includes an ordinance passed by a municipality. (p. 358.)

MUNICIPAL ORDINANCE.—PUBLICATION IS ESSENTIAL TO THE VALIDITY of a municipal ordinance, under a statute providing that such by-laws “shall take effect and be in force at the expiration of five days after they have been published.” (pp. 358, 359.)

PUBLICATION BEING ESSENTIAL TO THE VALIDITY OF A MUNICIPAL ORDINANCE GRANTING A STREET RAILWAY FRANCHISE, such step must be taken before the power to grant the franchise is withdrawn. (p. 359.)

PUBLICATION IN AN EXTRA EDITION of fifty or one hundred copies issued at 11 o'clock at night, and only distributed to a few persons directly interested, is not an official publication as required by law. (p. 359.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—DISCRIMINATION BETWEEN CITIZENS.—A MUNICIPAL ORDINANCE granting a street railway franchise to a company engaged in interstate commerce, which, in the regulation of rates, discriminates in favor of the citizens of one state as against those of another, violates the interstate commerce clause of the United States constitution. (p. 360.)

CONSTITUTIONAL LAW—DISCRIMINATION BETWEEN CITIZENS—UNIFORM OPERATION OF LAWS.—A MUNICIPAL ORDINANCE granting a street railway franchise which, in the regulation of fares, does not operate uniformly upon all citizens of the state, is unconstitutional. (p. 360.)

Wright & Baldwin, for the appellant.

Hard & McCabe, for the appellee.

³² McCLAIN, J. The objection to the ordinance that it was not properly published is based on the following facts: The ordinance was passed on September 20, 1897, while the provisions of the code of 1873 were still in force. It was signed by the mayor at 9 o'clock on the evening of the thirtieth day of the same month. On the first day of October the code of 1897 took effect, under the provisions of which it was not competent for the council to grant such a franchise without submission of the question to a vote of the people of the city. If the ordinance did not take effect as a valid act before the first day of October, it is not valid at all, for no submission of the question was made or provided for. Section 492 of the code of 1873 provides that "all ordinances shall as soon as may be after their passage be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council and the clerk, and all by-laws of a general or permanent nature . . . shall be published in some newspaper of general circulation in the municipal corporation: Provided, however, that if no such newspaper is published within the limits of the corporation, then and in that case such by-laws may be published by posting, . . . and such by-laws and ordinances shall take effect and be in force at the expiration of five days after they have been published." About 11 o'clock at night on the 30th of September a so-called extra edition of a daily paper published at Council Bluffs was issued, containing a publication of this ordinance, and also of another ordinance of similar character. From fifty to one hundred copies of such edition were printed, all of which were ³³ purchased by persons directly interested in the ordinance in question, and sold on the streets and on trains by the persons who procured them for this special purpose. On October 1st the ordinance was published in due form in the regular edition of the same paper. It is contended on behalf of plaintiff that publication of the ordinance was essential to its validity, that the publication in the extra edition was not such publication as was required, and that therefore the ordinance did not become a valid act prior to the taking effect of the code of 1897, and is not valid now. But defendant insists that the publication was sufficient, and that, even if it was not, publication was not essential to the validity of the ordinance, or, if required at all, might be made after the provisions of the code of 1873, under which it was enacted, had been superseded by the provisions of the code of 1897. The term "by-law of a general or per-

manent nature," used in the section of the code of 1873 above quoted, certainly includes ordinances such as that which we have before us. A by-law is "a law made by a municipality for the regulation of affairs within its authority; an ordinance": Century Dictionary. "In general and professional use the term 'ordinance' is almost, if not quite, equivalent in meaning to the term 'by-law,' and is the word most generally used to denote the by-laws adopted by municipal corporations": 1 Dillon on Municipal Corporations, 4th ed., sec. 307. The ordinance in question was of a general and permanent nature, and plainly was within the term "by-law," used in the statutory provision. The section of the code of 1873 above referred to provides that such by-laws "shall take effect and be in force at the expiration of five days after they have been published." We are of the opinion that publication is essential to the validity of such an ordinance. Until published it does not take effect. To insist that it is a valid ordinance, although not published, and that a subsequent publication is simply a condition to its enforcement, would be no more reasonable ³⁴ than to insist that it is valid when passed by the council, and that the signature of the mayor is merely a subsequent condition necessary to its going into operation. If the ordinance did not take effect until five days after it was published, then it did not take effect at all until after the code of 1897 came into force; and under section 776 of that code, no such franchise can be granted or renewed unless submitted to a vote of the electors, and a majority of the legal electors voting thereon in favor of the same. If this ordinance did not become a valid ordinance before the first day of October, 1897, it has not become an ordinance at all. See *State v. Dawson*, 16 Ind. 40, where it is held that a corporate charter granted by special act, which had not become valid by acceptance prior to the taking effect of a constitutional provision forbidding the granting of charters in that manner, did not afterward become valid by acceptance. In our opinion, the publication was one of the steps necessary to make this a valid ordinance. The provision about publication is not directory only, but compliance with it is essential to the validity of an ordinance. This step not having been taken as required by law, and during the time when such an ordinance might be passed, the ordinance fails. It may be further said that the ordinance itself contains a provision that it shall take effect and be in force "after its publication according to law." If it was not published according to law within the time during

which such an ordinance might lawfully be enacted, it was not published "according to law" at all.

We have assumed in the preceding statement that there was no sufficient publication on the 30th of September. It is hardly necessary to cite authorities to show that a publication in an extra edition of fifty or one hundred copies issued at 11 o'clock at night, and not mailed to subscribers or otherwise distributed, except as sold by parties directly interested, was not an official publication. The following cases, however, will be found to be in point: *Pratt v. Tinkcum*, 21 Minn. 142; *Tully v. Bauer*, 52 Cal. 35 487; *Scammon v. City of Chicago*, 40 Ill. 146; *Ormsby v. City of Louisville*, 79 Ky. 197.

The other objection to the ordinance was also, as we think, correctly sustained. It is provided therein that, as one of the considerations for the extension of the franchise, defendant "shall constantly keep at its principal office in Council Bluffs and in some convenient central locality, for sale to the residents of Council Bluffs for a sum not to exceed one dollar and fifty cents, commutation tickets good for thirty rides for thirty days from the date of issue, from any point on its line in Council Bluffs over its bridge to any point in Omaha to which its cars may be operated, . . . and from said point in Omaha over its bridges and lines to any point of its lines in Council Bluffs, which said tickets shall be nontransferable and irredeemable except for unavoidable casualty." There can be no question but that defendant, whose business, under this franchise, included the transportation of persons between Council Bluffs and Omaha, was engaged in interstate commerce, and any regulation of rates discriminating in favor of the citizens of this state as against those of another state must necessarily be invalid: *Guy v. City of Baltimore*, 100 U. S. 434; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826; *Lake Shore etc. R. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. Rep. 565. Furthermore, the ordinance is invalid under the provision of the constitution of Iowa (article 1, section 6), which requires that laws of a general nature shall have uniform operation. This ordinance does not operate uniformly as to all persons who would be entitled to ride on the cars of defendant company, but gives a privilege to those who are citizens of Council Bluffs not enjoyed by other citizens of the state. Both objections are sustained in the case of *Town of Pacific Junction v. Dyer*, 64 Iowa, 38, 19 N. W. 862, where this court held that an ordinance requiring transient merchants to pay a

certain ³⁰ license, and defining a transient merchant to be "every nonresident person who shall sell, exchange," etc., was unconstitutional, because, so far as it discriminated against nonresident merchants of Iowa, it was in conflict with the commerce clause of the federal constitution, and so far as it discriminated in favor of resident merchants of a town, it was in conflict with the state constitution, and that, as the town council derived its power from the legislature of the state, it could not do what the legislature could not do: See, also, *City of Marshalltown v. Blum*, 58 Iowa, 184, 43 Am. Rep. 116, 12 N. W. 266; *City of Stuart v. Cunningham*, 88 Iowa, 191, 193, 55 N. W. 311.

Affirmed.

A Municipal Ordinance may be published at any time when the time of publication is not fixed by statute: *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278.

State Regulation of Interstate commerce is discussed in the monographic note to *People v. Wemple*, 27 Am. St. Rep. 547-568. Consult, also, the recent cases of *Pullman Co. v. Adams*, 78 Miss. 814, 84 Am. St. Rep. 647, 30 South. 757; *Adkins v. Richmond*, 98 Va. 91, 81 Am. St. Rep. 705, 34 S. E. 967; *St. Louis v. Consolidated Coal Co.*, 158 Mo. 342, 81 Am. St. Rep. 310, 59 S. W. 103; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165; *Ex parte Young*, 36 Or. 247, 78 Am. St. Rep. 772, 59 Pac. 707.

LEMMON v. TOWN OF GUTHRIE CENTER.

[113 Iowa, 36, 84 N. W. 986.]

APPEAL.—THE PROPRIETY OF MAKING A RESTRAINING ORDER WITHOUT NOTICE cannot be questioned on appeal, where no ruling was ever entered on a motion to dissolve. (p. 362.)

INJUNCTION.—THE UNAUTHORIZED ISSUANCE OF A RESTRAINING ORDER without notice furnishes no reason for refusing a temporary injunction after a full hearing. (p. 362.)

INJUNCTION.—THE PENDENCY BEFORE A MAYOR OF PROCEEDINGS TO REMOVE A BUILDING is no obstacle to the granting by a court of an injunction to restrain such removal, where the mayor is without jurisdiction to entertain such proceedings. (p. 362.)

FIRE LIMITS—REMOVING BUILDING.—A building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceedings whatever. (p. 362.)

INJUNCTION—FIRE LIMITS.—UNDER AN ORDINANCE FIXING FIRE LIMITS, which permits veneered buildings to be erected, and provides that a building may be removed upon two days' notice if the ordinance is not complied with, a person is en-

titled to a reasonable time within which to put his building in the condition exacted by the ordinance. and an injunction may issue to restrain the removal of the building within such time. (pp. 362, 363.)

INJUNCTION.—THE REMOVAL BEYOND THE FIRE LIMITS of a building permanently located and which has become a part of the land is such an injury to the real estate as will justify an injunction without any showing of insolvency on the part of the defendants. (pp. 364, 366.)

AN INJUNCTION WILL ISSUE WHENEVER THE THREATENED TRESPASS will permanently diminish the substance of the estate in that which constitutes its chief value, without reference to the fact that the value may be measured in money. (p. 366.)

An ordinance of Guthrie Center fixed fire limits and prohibited the erection of certain buildings, and, for a violation, authorized the removal of building upon two days' notice. Plaintiff was served with this notice. Proceedings were begun before the mayor for the purpose of securing the removal of plaintiff's building, during which plaintiff brought suit praying for an injunction. A notice of the hearing issued by the judge required the defendants to leave the building where it was, and not to make any order in relation thereto. Upon the hearing a temporary injunction was granted.

Charles W. Hill and Henry B. Holsman, for the appellants.

W. D. Milligan, for the appellee.

³⁸ LADD, J. If the admonition of the judge in the notice of the hearing, not to interfere with the building, be regarded as a restraining order, no ruling was ever entered on the motions to dissolve. These appear to be undisposed of, and, until some ruling by the trial judge or court is had, the propriety of making such an order without notice cannot be questioned in this court. Even were it unauthorized, that fact would furnish no reason for not issuing the temporary writ after a full hearing. Nor did the pendency of the proceedings before the mayor of Guthrie Center, in which a writ of execution directing the marshal to remove the building beyond the fire limit was sought, interpose any obstacle to granting the relief prayed. Neither the ³⁹ ordinances of the town nor the statutes of the state confer jurisdiction on the mayor's court to issue such a writ. Nor was any such action necessary. The ordinance empowered the mayor or marshal, in virtue of his office, in event of the owner's failure to desist or remove on two days' notice, "to enter on said premises, and abate or remove the same." No order or writ of execution was essential. A build-

ing erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceedings whatever: *Eichenlaub v. City of St. Joseph*, 113 Mo. 395, 21 S. W. 8; *Hine v. City of New Haven*, 40 Conn. 478; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Klingler v. Bickel*, 117 Pa. St. 328, 11 Atl. 556; *McKibben v. Ft. Smith*, 35 Ark. 352. Delays of that character might endanger the public safety, and ought not to be tolerated. As the mayor was without jurisdiction, there was no occasion for postponing the hearing until he had rendered a decision.

2. The statute confers the power on towns and cities "to establish fire limits, and to prohibit within such limits the erection of any building or addition thereto," unless the outer walls be of a material named; and, as the plaintiff declared his intention to veneer the building, the order merely gave him an opportunity to do so, without deciding whether a removal from one lot to another or a different part of the same lot within the prescribed limits constituted an erection thereof within the meaning of section 711 of the code. That question, then, is not before us. But see *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *Brady v. Insurance Co.*, 11 Mich. 451; *Kaufman v. Stein*, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333; *Brown v. Hunn*, 27 Conn. 332, 71 Am. Dec. 71. Whatever the conclusion on that point, it does not follow that removals may not be prohibited by an ordinance of the town or city, under a statute like ours, as a regulation against the danger by fire. The ordinance in this case contained no provision requiring the procurement of a permit preliminary to the erection⁴⁰ or removal of a building, but it stipulated that "any frame building with four-inch veneer of the outer walls" and a roof of noncombustible material should be construed as complying with its conditions. Of necessity, the superstructure must be erected or located in some situation before the brick may be placed, and the owner is entitled to a reasonable time within which to accomplish this. The plaintiff appears to have contracted for a sheet-iron covering prior to the removal, but, upon discovering this did not comply with the ordinance, arranged to put on a brick veneer. The order allowed him eight days within which to accomplish this, and it cannot be thought an unreasonable time. The two days' notice to desist or remove does not limit the time of completion; otherwise, the ordinance in effect, because of the brevity of period fixed, would

prohibit the very structures it authorizes. Until the plaintiff had a reasonable time within which to put his building in the condition exacted by the ordinance, the officers had no right to tear down or remove it.

3. But it is said a trespass merely was threatened, and that for this the law affords ample remedy. It appears that plaintiff was about to make use of the building in which to store tools and materials during the construction of an addition to a brick block near by, that there was no other accessible shelter, and that the defendants proposed to remove it beyond the fire limits. The rule that equity will not interfere with a threatened trespass save to prevent irreparable injury has been too often declared for repetition. What will constitute such an injury is sometimes difficult to determine. The general grounds for such relief are enumerated in *Cowles v. Shaw*, 2 Iowa, 496; *City of Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628, and other cases. The entire question seems to hinge on whether the damages actually recoverable at law will, in the nature of things, afford adequate compensation; and the rule resulting from all the cases is perhaps more clearly stated by Pearson, J., ⁴¹ in *Gause v. Perkins*, 3 Jones Eq. 177, 69 Am. Dec. 728, than elsewhere: "The words mean that which cannot be repaired, put back again, atoned. . . . The injury must be of a peculiar nature, so that compensation in money cannot atone for it. Where, from its nature, it may thus be atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable." Mr. Freeman, in a note to *Jerome v. Ross*, found in 11 Am. Dec. 501, thus enumerates the reasons why "an injury resulting from trespass may be incapable of compensation": "1. It may be destructive of the very substance of the estate; 2. It may not be capable of estimation in terms of money; 3. It may be so continuous and permanent that there is no instant of time when it can be said to be complete, so that its extent may be computed; 4. It may be vexatiously persisted in, in spite of repeated verdicts at law; 5. It may be committed by one who is wholly irresponsible, so that a verdict against him for damages would be entirely valueless; 6. It may be committed against one who is legally incapacitated from a beneficial use of the remedy at law. Generally, however, in cases where equitable relief is granted, the injury will be found to include several of these features." It needs no argument to show that the mere deprivation of the use of

this building as a storehouse would not be an irreparable injury. If any there could have been, it was because the mischief threatened reached to the substance and value of the estate, and went to the destruction of it in the character in which it was enjoyed. Thus a party may be enjoined from cutting down trees: *Musch v. Burkhart*, 83 Iowa, 301, 32 Am. St. Rep. 305, 48 N. W. 1025; *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371. And see, generally, cases collected in which the injury threatened has been adjudged of such a character as would tend to destroy the estate or its enjoyment in note to *Dudley v. Hurst*, 1 Am. St. Rep. 368. This building appears to have been permanently located, and a part of the land. Was its removal ⁴² beyond the fire limits such an injury to the real estate as would justify an injunction without any showing of insolvency on the part of defendants? In England, "if an alleged trespasser is about to tear down a dwelling-house, an injunction will be issued without an averment that he is insolvent; for although, with money enough, as good or a better house can be built, still it involves a matter of feeling—there is an attachment to the house in which our ancestors lived": *Gause v. Perkins*, 3 Jones Eq. 177, 69 Am. Dec. 728. What force might be given to such a sentiment in this country, where little attention is bestowed on the incident of lineage, need not now be discussed. In *Echelkamp v. Schrader*, 45 Mo. 505, the defendant was enjoined from sawing a double house in two at what he supposed the line, but in fact over the portion occupied by plaintiff three feet. So, in *De Veney v. Gallagher*, 20 N. J. Eq. 33, a party was restrained from removing ten inches of a dwelling-house which he supposed extended that distance over the boundary. These decisions seem to rest on the principle that a person will not be disturbed in the occupancy of his dwelling-house pending the adjustment of a suit over a boundary line. In *Clowes v. Beck*, 13 Beav. 347, the removal of the material near plaintiff's mansion house, exposing it to the encroachments of the sea, pending the institution of an action at law, was enjoined. In *Lewis v. Town of North Kingston*, 16 R. I. 15, 27 Am. St. Rep. 725, 11 Atl. 173, the road supervisors were enjoined from removing a building from plaintiff's lot; but this appears to have been, in part at least, on the ground that it was proposed to grade and obliterate the boundaries. In *District Township of Lodomillo v. District Township of Cass*, 54 Iowa, 117, 6 N. W. 163, the removal of a schoolhouse was enjoined, for that its use was essential to en-

able the plaintiff to perform its duty in maintaining the public schools. In *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434, and *Heffran v. Hutchins*, 160 Ill. 550, 52 Am. St. Rep. 43 353, 43 N. E. 709, the removal of buildings to lots within the fire limits was enjoined. See, also, *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505; *Weigel v. Walsh*, 45 Mo. 560. But in these cases some other ingredient was superadded to the destruction of the buildings on the land; i. e., that which was essential to its enjoyment, regardless of the money measure of the injury. An examination of all the cases, as is well observed by Mr. Freeman in his note to *Jerome v. Ross*, 11 Am. Dec. 501, indicates a strong tendency to grant equitable relief whenever the trespass permanently diminishes the substance of the estate in that which constitutes its chief value, without reference to the fact that the value may be measured in money, on the ground that the plaintiff is entitled to have the identity and integrity of his estate preserved. The removal of this building was an interference with the real estate, such as to absolutely deprive the plaintiff of the beneficial enjoyments of its present use. No one can say how much advantage is to be derived from a naked lot so located. Besides, he had the right to the occupancy of the land with the building thereon. He was entitled to its enjoyment, rather than to the damages occasioned by stripping it of the very improvement designed for his particular purposes. The structure, in that sense, was part of the land, and the threatened injury went to the destruction of it in the character in which it was enjoyed; and when the destruction or removal of a permanent structure, which in law is deemed a part of the real estate, and designed for the owner's particular use, is threatened, we think he should be protected in its enjoyment, and to that end a writ of injunction may issue. There is a wide difference between such a case and the mere removal of stone or earth, which in no way interferes with occupancy and the only damage is the value or cost of replacing.

Affirmed.

Injunctions.—An injury which tends to the destruction of an estate, or is of such a character as to work the destruction of the property as it has been held and enjoyed, will be treated as irreparable within the law of injunctions: See the monographic notes to *Dudley v. Hurst*, 1 Am. St. Rep. 376; *Jerome v. Ross*, 11 Am. Dec. 497-507. A continuing trespass may be enjoined: *Boston etc. R. R. v. Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689. Moving a building to a place within the fire limits of a city may be enjoined: *Griswold v. Brega*, 160 Ill. 490, 52 Am. St. Rep. 350, 43 N. E. 864.

STOKES v. MAXSON.

[113 Iowa, 122, 84 N. W. 949.]

AN ENCUMBRANCE ON LAND is a right in a third person therein, to the diminution of the value of the land, though consistent with the passing of the fee by a deed of conveyance. (p. 368.)

AN EASEMENT IS A LIBERTY, PRIVILEGE, OR ADVANTAGE IN LAND without profit, existing distinct from the ownership of the soil. (p. 368.)

HOMESTEAD—ENCUMBRANCE.—A RIGHT TO USE THE stairway of a building occupied as a homestead, which stairway also furnishes access to an adjoining building, is an easement and not an encumbrance of the homestead; hence both husband and wife are not required to join in the execution of an agreement granting such right. (pp. 368, 369.)

E. C. Nichols and E. M. Warner, for the appellant.

J. E. McIntosh and P. M. Detwiler, for the appellee.

122 GIVEN, C. J. 1. Appellant's counsel state the facts correctly and sufficiently for the purpose of the questions to **123** be considered, as follows: "The plaintiff and defendant are owners of adjoining brick buildings, two stories high, in West Liberty, Iowa, the front wall of the buildings being at the street line. The lower story of each building is used for business purposes. The plaintiff, with his family, occupies the second story of his building as a homestead, and the second story of her building is occupied in the same way by defendant and her family. The front stairway by which the upper stories of both buildings are reached, the door by which the stairway is entered from the street, and the hall or landing in which it ends upon the second floor are all the property of the defendant, and are all within the limits of her real property as described in the pleadings. The defendant is a married woman, and was at the time of the execution of the instrument set out in the petition and upon which the action is based. The instrument was not signed by her husband. After the contract was executed, the plaintiff allowed part of his dwelling to be occupied by a dressmaker, whose patrons reached her establishment by the stairway in question, and whose business was advertised by a sign attached to defendant's front door; the door by which the stairway is entered from the street." We may add that the sign was removed; that the patrons of the dressmaker were few; that the business in that place was abandoned

in a short time, and that the plaintiff paid six months' rent, and has offered to pay rent since, which has been refused. There is evidence that the written agreement was destroyed without plaintiff's consent, but, as both parties treat it as still existing, we need not further notice that evidence. The written agreement is as follows:

"This written agreement, made and entered into this twenty-eighth day of April, A. D. 1898, between Mrs. W. G. Maxson, party of the first part, and J. E. Stokes, party of the second part, both of West Liberty, Iowa, Muscatine County. 2. The party of the first part agrees to let party of the second part use the front stairway between the Maxson and Stokes buildings in consideration ¹²⁴ of three dollars (\$3.00) per year, payable every six months. 3. The party of the first part agrees to let the party of the second part use the front stairway as long as the party of the second part wants it. (a) The party of the second part agrees to pay the party of the first part three dollars per year for the use of the stairway between the Maxson and Stokes buildings. (b) The party of the second part agrees to clean step one-half time.

[Signed]

"MRS. W. G. MAXSON.

"J. E. STOKES."

2. Defendant's contention is that, as her property is the homestead of herself and husband, said agreement is void, because her husband did not join in the execution thereof; and cites section 2974 of the code, which is as follows: "No conveyance or encumbrance of or contract to convey or encumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not, but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or encumbrancer." The question is whether the right granted is an encumbrance on the defendant's homestead. The right granted is "the use of the front stairway . . . as long as the party of the second part wants it." For this use the plaintiff agreed to pay three dollars a year, payable every six months, and "to clean steps one-half the time." "An encumbrance is defined to be a right in a third person in the land in question, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance": *Barlow v. McKinley*, 24 Iowa, 70: "An easement is a liberty, priv-

ilege, or advantage in land without profit, existing distinct from the ownership of the soil; and because it is a permanent interest in another's land, with a right to enter at all times and enjoy it, it must be founded upon an agreement by writing or upon prescription. But a license is an authority to do a particular act, or series of acts, upon another's ¹²⁵ land, without possessing any estate therein. It is founded in personal confidence, and is not assignable, nor within the statute of frauds. The distinction between a license and an easement is oftentimes very subtle and difficult to discern": *Cook v. C. B. etc. R. R. Co.*, 40 Iowa, 456. "Can a husband grant a right of way to a railroad over the homestead property unless the wife concurs in and signs the conveyance? As applied to the circumstances of this case, we answer this question also in the affirmative. The right of way is but an easement, and does not pass the title; and in this case it does not, and is not claimed to, affect the substantial enjoyment of the homestead as such. If the homestead was a single lot, and the right of way occupied it all, so as to destroy the homestead or defeat its occupancy as such, the case would be very different": *Chicago etc. R. R. Co. v. Swinney*, 38 Iowa, 184. See, also, *Ottumwa etc. Ry. Co. v. McWilliams*, 71 Iowa, 165, 32 N. W. 315; *Harkness v. Burton*, 39 Iowa, 104. These cases, we think, fully answer the defendant's contention. The right to use the stair and doorway does not pass title to the real estate, and does not affect the substantial enjoyment of the defendant's homestead as such. *McGowen v. Myers*, 60 Iowa, 257, 14 N. W. 788, cited by appellant, is not in point, as in that case the right to use the stairway was reserved in the deed, and provided for in a contract by which a building was to be erected and a stairway provided. In that case the right to the stairway was in diminution of the value of the land. Other cases cited we do not find to be in point. We conclude that the decree is correct, and it is therefore affirmed.

An Easement is a liberty, privilege, or advantage in land, without profit, and existing distinct from the ownership of the soil: *Hazleton v. Putnam*, 3 Pinn. 107, 54 Am. Dec. 158; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190. See, also, *Albright v. Cortright*, 64 N. J. L. 330, 81 Am. St. Rep. 504, 45 Atl. 634; *Jarvis v. Seele Mill. Co.*, 173 Ill. 192, 64 Am. St. Rep. 107, 50 N. E. 1044; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432, 20 N. E. 581.

An Encumbrance is any right to or interest in land which may subsist in third persons to the diminution of the value of the land and not inconsistent with the passing of the fee in it by deed: *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428, 46 N. W. 1015.

Homestead.—A husband cannot, without the consent of his wife, grant a right of way for a railroad across land occupied as a homestead by his family: *McGhee v. Wilson*, 111 Ala. 615, 56 Am. St. Rep. 72, 20 South. 619; *Pilcher v. Atchison etc. R. R. Co.*, 38 Kan. 516, 5 Am. St. Rep. 770, 16 Pac. 945. Compare *Chicago etc. Ry. Co. v. Titterington*, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472. And the dedication as a public street of lands subject to a homestead cannot, as against a wife, result from the acts or agreement of her husband: *San Francisco v. Grote*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127.

McCLELLAND v. SAUL.

[113 Iowa, 208, 84 N. W. 1034.]

PRINCIPAL AND AGENT.—NOTICE TO AN AGENT, received while he was looking after the interest of his principal in the property in question, is notice to his principal, whether he was called upon to act thereon or not. (pp. 370, 371.)

PRINCIPAL AND AGENT.—KNOWLEDGE ACQUIRED BY AN AGENT within a reasonable time before the agency exists is imputed to the principal. (p. 371.)

APPEAL—TRANSFERRING LAW CASE TO EQUITY CALENDAR.—To review on appeal an order of a trial court transferring a case in a law action to the equity calendar, error must be assigned by the party complaining thereof. (p. 371.)

Deacon & Good, for the appellants.

U. C. Blake and John M. Redmond, for the appellees.

200 SHERWIN, J. The property involved in this case is a printing press and folder which were sold by appellees to the appellants' tenant. There is a conflict in the evidence as to just when the property was placed in the building, but we think it fairly appears that there was a completed delivery of the press and folder late on the nineteenth day of August, 1897. The mortgage under which appellees claim bears the date of August 14, 1897. It was acknowledged August 19th, and recorded the next day. The acknowledgment of the mortgage was taken by Mr. Good, of the firm of Deacon & Good, attorneys for the appellants herein. It is apparent that, if the appellants had no actual notice of the mortgage to the appellees, their lien as landlords would be superior to that of the mortgagees, because the tenant had acquired title to the property before the recording of the mortgage would convey constructive notice to them. But the record before us conclusively shows that Deacon & Good were the agents of the plaintiffs for the

leasing and management of the property occupied by the tenant in question, which property belonged to an estate in which the plaintiffs were all interested. That the mortgage was executed and acknowledged before the title passed to the tenant, we do not doubt. Mr. Good, one of plaintiffs' agents, took the acknowledgment, and had actual knowledge of the existence of the mortgage. Was this sufficient notice to his principal? We think it was. It is an elementary principle that notice to an agent, while acting within the ²¹⁰ scope of his authority, and relating to matters over which his authority extends, is notice to his principal. But it is contended that it was not sufficient in this case, because it was not acquired by the agent after he was called upon to act in the matter by the principal. This position, however, is not well taken. At the very time this information was received by him he was one of the agents looking after the entire interest of all the plaintiffs in the property in question. Whatever notice he had at the time was full and complete notice to his principals, whether he was called upon to act thereon or not. The weight of authority seems now to favor the rule that knowledge acquired before the agency exists shall be imputed to the principal, and it will be presumed that the agent retains the knowledge for a reasonable time: *Mecham on Agency*, sec. 721, and cases cited; *The Distilled Spirits*, 11 Wall. 367; *Wilson v. Minnesota Farmers' etc. Ins. Assn.*, 36 Minn. 112, 1 Am. St. Rep. 659, 30 N. W. 401; *Yerger v. Barz*, 56 Iowa, 77, 8 N. W. 769. There is nothing in this case tending even to indicate that Mr. Good did not at all times have the matter fully in mind. We are of opinion, therefore, that the appellants had knowledge of the mortgage to appellees and that their lien is inferior to the mortgage. The action, as originally begun, was in law to recover rent only. An amendment was filed asking a writ of injunction, and praying for such other equitable relief as might seem just to the chancellor. The appellees answered, setting up their mortgage, and alleging a superior lien. After the issues were joined, they moved to transfer to the equity docket, which was done, and it was there tried; and complaint is made of the order of transfer. If it be conceded for present purposes that the plaintiffs might pray for general equitable relief, and, upon the defendants pleading superiority of lien, and moving to try the case in equity, object thereto, they are in no position to urge such claim now. If the action was still in law before its transfer to the equity calendar, the order of ²¹¹ transfer was in the

law action, and, to entitle the appellants to a review of the ruling thereon, error should have been assigned: *Powers v. O'Brien County*, 54 Iowa, 501, 6 N. W. 720; *Patterson v. Jack*, 59 Iowa, 632, 13 N. W. 724.

The judgment is affirmed.

Notice to an Agent is, ordinarily, notice to the principal: *Higman v. Camody*, 112 Ala. 267, 57 Am. St. Rep. 33, 20 South. 480; *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594, 36 Pac. 568; *German-American Ins. Co. v. Norris*, 100 Ky. 29, 66 Am. St. Rep. 324, 37 S. W. 267. And this rule applies to information acquired within a reasonable time prior to the existence of the agency. There are many authorities, however, to the contrary: See the monographic note to *Trentor v. Pothan*, 24 Am. St. Rep. 230. Consult, also, *Snyder v. Partridge*, 138 Ill. 173, 32 Am. St. Rep. 130, 29 N. E. 851.

BURK v. PUTNAM.

[113 Iowa, 232, 84 N. W. 1053.]

COMPETENCY OF WITNESSES.—THE LEGISLATURE HAS PLENARY POWER to prescribe the competency of witnesses in all actions, limited only by express constitutional guaranties. (p. 373.)

EVIDENCE—POWER TO CHANGE RULES OF.—There is no vested right in a rule of evidence, since it affects the remedy only, and is within the constitutional power of the legislature to change. (p. 373.)

CONSTITUTIONAL LAW—CLASS LEGISLATION.—A law, allowing husband and wife to testify against each other in a civil action brought by a judgment creditor to set aside a fraudulent conveyance of property between them, is not unconstitutional as being class legislation, since it applies to every person coming within the relation and circumstances provided for. (p. 373.)

CONSTITUTIONAL LAW—WITNESS—IMMUNITY FROM PROSECUTION.—A statute, allowing husband and wife to testify as to fraudulent conveyances of property between them, is not unconstitutional because it fails to grant immunity from criminal prosecution, as it merely fixes the competency of witnesses, and has no reference to the competency of evidence. (pp. 373, 374.)

WITNESSES.—IN THE ABSENCE OF A CLAIM OF PRIVILEGE on the part of a witness, his evidence must be considered in reaching proper conclusions. (p. 374.)

EXEMPT PROPERTY.—CREDITORS CANNOT MAKE CLAIM TO PROPERTY that would have been exempt had it remained in the hands of the debtor. (p. 374.)

EXEMPTION—PROPERTY GIVEN TO WIFE.—CREDITORS cannot subject to the payment of their judgments property in the name of the wife acquired by the husband's exempt earnings, given to her while they were exempt. (p. 374.)

C. S. Keenan and G. B. Jennings, for the appellants.

George H. Castle, for the appellee.

²³³ DEEMER, J. It is claimed that the legal title to certain lots now in the name of Jessie D. Putnam, and an interest that she claims in a partnership business in the town of Shenandoah, is fraudulent and void, as against creditors. To establish the claim of fraud, plaintiff introduced the defendants Putnam, who are husband and wife, as witnesses, and it is largely on their evidence that the decree of the district court is based. Appellants admit that, under the statute as it now reads, this evidence was admissible, but they claim that the statute is unconstitutional and void. The material part of the section is as follows: "That section 4606 of the code, prohibiting husband and wife from being a witness against the other, except in a civil action by one against a third party for alienating the affections of the other, be amended as follows: Or in any civil action brought by a judgment creditor against either husband or wife to set aside a conveyance of property from one to the other, on the ground of want of consideration or fraud and to subject the same to the payment of the judgment": Acts Twenty-seventh General Assembly, c. 108, sec. 1. This is said to be in violation of the constitution, because it favors the creditor class; because ²³⁴ it interferes with rights arising out of the domestic relation; because it does not grant immunity from criminal prosecution for fraud; and because violative of the spirit, if not the letter, of the constitutional guaranties against unreasonable searches, and in favor of absolute rights.

None of these reasons seems to be sound. That the legislature has plenary power to prescribe the competency of witnesses in all actions, limited only by certain express constitutional guaranties, is fundamental: *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. Rep. 195; *Ralston v. Lothain*, 18 Ind. 303; *Rich v. Flanders*, 39 N. H. 304; *John v. Bridgeman*, 27 Ohio St. 22. There is no vested right in a rule of evidence. Such rules affect the remedy only, and it is within the constitutional power of the legislature to change them. The same rule applies to the competency of witnesses: *Laughlin v. Commonwealth*, 13 Bush, 261; *Wormley v. Hamburg*, 40 Iowa, 22; *Drake v. Jordan*, 73 Iowa, 707, 36 N. W. 653. The law passed by the twenty-seventh general assembly applies to every person coming within the relation and circumstances provided for,

and is not subject to the objection that it is class legislation: *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *Iowa etc. Medical College Assn. v. Schrader*, 87 Iowa, 659, 55 N. W. 24, and other like cases.

If the statute in question required either husband or wife to give evidence against himself, and there was no statute exempting him from answering questions that were incriminating in character, there might be grounds for holding it unconstitutional, under the doctrine announced in the *Counselman* case. But the statute in question simply defines the competency of witnesses. There is no provision requiring them to testify to any fact that would tend to convict them of the crime of making a fraudulent conveyance under section 5042 of the code, as in section 4075, which requires answers to interrogatories tending to show fraud. Section 4612 expressly excuses one from answering a question that would tend to criminate him. Neither ²³⁵ of the witnesses in this case made any such objections to the questions propounded to them, and the statute itself does not compel them to respond to a question, truthful answer to which would tend to criminate. As already said, the statute fixes the competency of the witness, and has no reference to the competency of the evidence sought to be elicited. The statute was in force at the time of trial, and, as it relates to the remedy, must govern the procedure. It is not vulnerable to the objections urged, and in the absence of claim of privilege on the part of witness, the evidence must be considered in reaching proper conclusions.

Further, it is argued that some of the property was exempt when transferred to Jessie D. Putman, and that various sums given her by her husband, with which to acquire part of it, were also exempt. These claims, except in so far as they were recognized by the trial court, are without merit. Creditors cannot, of course, make claim to property that would have been exempt had it remained in the hands of the debtor, nor can they subject property in the name of the wife acquired by the husband's exempt earnings, given to her while they were exempt. But the trial court recognized these rules in the decree, and defendants have no just cause of complaint.

Lastly, it is argued that the evidence does not support the decree. That claim has received due consideration, and, without setting forth the evidence on which we base our conclusions, it is sufficient to say that they accord with the findings of the court. If there is any error, it was in not allow-

ing the plaintiff greater relief than seems to have been granted. Appellants' motion to strike out appellee's abstract is overruled. The decree in each case is affirmed.

Constitutional Law.—Whatever belongs to the remedy may be altered at the pleasure of the state, provided the alteration does not impair the obligation of contracts: *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022; *Kirkman v. Bird*, 22 Utah, 100, 83 Am. St. Rep. 774, 61 Pac. 338. The rules of evidence pertain to the remedy, and are, therefore, subject to modification and control by the legislature. No one has a vested right in them: *Meadowcraft v. People*, 16 8 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303; *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278, 37 N. E. 247; *People v. Turner*, 117 N. Y. 227, 15 Am. St. Rep. 498, 22 N. E. 1022. A law making a witness incompetent is valid: *O'Bryan v. Allen*, 108 Mo. 227, 32 Am. St. Rep. 595, 18 S. W. 892.

Fraudulent Transfer.—A transfer of exempt property is not fraudulent as to creditors: *Cox v. Birmingham Drygoods Co.*, 125 Ala. 320, 82 Am. St. Rep. 238, 28 South. 456; *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595, 81 N. W. 359; *Barron v. Williams*, 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561.

BALDWIN v. GERMAN INSURANCE COMPANY.

[113 Iowa, 314, 85 N. W. 28.]

INSURANCE—MORTGAGE CLAUSE—ESTOPPEL.—If an insurance policy is void, and the company, without knowledge thereof, attaches a mortgage clause to the policy without consideration at the instance of the mortgagee, who is also ignorant of the fact that the policy is void, and who because of the mortgage clause neglects to get other insurance, the company is not thereby estopped to deny the validity of the policy. (p. 376.)

McVey & McVey, for the appellants.

Wright & Baldwin, for the appellee.

315 GRANGER, C. J. The two cases were submitted and considered together. They were before in this court, submitted in like manner, and the opinion will be found in *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326. The facts are there fully stated, and restatement of them is unnecessary, except to have in mind, in a general way, the issues. Each policy contains a provision that, if the buildings insured shall become vacant, the policy shall be void. The answers present that issue, and the facts are without dispute. On the other appeal, the policies were adjudged void for that reason.

That holding is conclusive on this appeal, unless the policies have validity for reasons to be considered.

The plaintiff is trustee for the Council Bluffs Savings Bank, and, as such, holds the title to insured property by virtue of a trust deed securing the plaintiff for the payment of a large amount of money as trustee of said bank. The policies issued in April, 1891, and July 13, 1894, the plaintiff took them to the respective agents of the companies, with mortgage clauses prepared and attached to the policies, and the agents signed said clauses. These mortgage ³¹⁶ clauses provided that any loss or damage which should arise under the policy should be payable to the plaintiff, as trustee. At the time of signing these clauses, each policy was void because of non-occupancy of the premises, but neither agent nor the plaintiff knew of the fact. On the other appeal it was held that, as the policies were void when the clauses were attached, there being no consideration for them, the attaching of the clauses did not revive or create valid contracts. The answers present pleas of estoppel, and on the other appeal it was simply said that the pleas of estoppel were not established by the evidence. The causes were reversed and remanded, and on another trial below some additional evidence was taken, directed to the issue of estoppel. The district court found with the plaintiff on such issue, and the correctness of that finding is the only question we have on this appeal.

It appears from the evidence of the trustee, taken on the trial, that he relied on the insurance by virtue of the mortgage clauses, and because of such reliance he did not get other insurance. There is no claim that either company had notice of nonoccupancy of the premises by which the policies became void. It is, then, a case in which a policy is void, and the company, without knowledge of that fact, attaches a mortgage clause to the policy at the instance of a trustee, who is also ignorant of the fact that the policy is void, and the trustee, because of the mortgage clause, neglects to get other insurance. Is the company, because of such facts, estopped to deny the validity of the policy? We think not. The policies had been valid, and both the companies and the trustee assumed them to be so when the clauses were attached, because neither had been informed of the vacancy of the premises which rendered the policies void. The trustee held the mortgages, and knew of the terms upon which they would become void, and was certainly as much ³¹⁷ charged with knowledge of facts

that would avoid them as the companies. The companies acted at his instance, without consideration, merely to enable him to take insurance that would otherwise go to the beneficiaries named in the policies. It was in effect a substitution of beneficiaries under the policies, so that the trustee might take, in case of loss, as his interest might appear, instead of the original beneficiaries. The situation is one of mutual mistake, as to which neither party is at fault. Why, under such circumstances, attach to such acts on the part of the companies the obligations of a contract where none existed? If a party fails to speak when he should, his silence may estop him to speak afterward to the prejudice of another, if, when silent, he knew of the facts of which he should have spoken; but if he had no knowledge of such facts he is not estopped: *Davenport Cent. Ry. Co. v. Davenport Gaslight Co.*, 43 Iowa, 301. The principle is the same in this case. The trustee desired to be substituted so as to receive payment if the companies became liable under the policies, and nothing more was expected; and that much the companies intended to grant, and nothing more. If the companies had then known the policies were void, and by silence or acts had misled the trustee to his prejudice, the case would be different. Great reliance is placed on *Syndicate Ins. Co. v. Bohn*, 65 Fed. Rep. 165. Without intimating our approval or disapproval of the rule and reasoning of that case, it is sufficient to say that that case involved no question of estoppel, as in these cases. In these cases, on the former appeal, we held that, as no consideration was paid for the mortgage clauses, the policies being void, the mortgage clauses did not revive or create valid contracts. If, then, the plaintiff can recover, it must be because the companies are estopped to speak the truth, and say they were no contracts, so as to secure the advantages of that adjudication. In the *Bohn* case it is said: "The agreement evidenced by this mortgage clause was therefore ³¹⁸ a valid contract between the mortgagee and the insurance companies, made upon sufficient consideration, for the evident purpose of protecting the indemnity guaranteed to the mortgagee by the companies against destruction by any act of neglect of the mortgagors." The distinguishing fact of the cases is this: In the *Bohn* case the mortgagee made a valid contract with the insurance companies for insurance under the mortgage clause, and the holding was that by virtue of that contract he had a right of recovery. In these cases there is no contract liability, and the

question is, Does the doctrine of estoppel prevent companies from saying so? Surely, to justify a recovery on such grounds, the rule should be undoubted, and we are not cited to any case where such a rule has been announced. It is to be kept in mind that the mortgage clauses in these cases are not held void because of facts existing at the inception of the insurance contract, but the policies became void because of conditions subsequently broken, and the mortgage clauses were never of force because of no consideration for their support. These cases, as now presented, in no way involve the construction of an existing contract, as in the Bohn case. We are also cited to *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141, which is cited with approval in the Bohn case. The distinguishing feature of the case is manifest. Subsequent to the issuing of the policy in that case, the mortgagee obtained from the company the mortgage clause, and the case holds that the mortgage clause operated as an independent insurance of the mortgagee's interest, and the right of recovery was based on the construction of an existing contract, as to whether or not it was affected by other insurance taken in violation of the terms of the policy. It was a question of the rights of the parties under a contract confessedly valid, and not one of estoppel only, to show the invalidity of a contract. We think the defendants are not estopped to deny the validity of the mortgage clauses, and the judgment in each case must stand reversed.

Insurance.—When a condition of forfeiture in a policy of fire insurance applies against a mortgagee to whom the loss has been made payable, is considered in the monographic note to *Oakland Home Ins. Co. v. Bank of Commerce*, 58 Am. St. Rep. 667-673. The revival of forfeited insurance is discussed in the monographic note to *Born v. Home Ins. Co.*, 80 Am. St. Rep. 305-311. A clause in a policy of insurance making the loss payable to the mortgagee and providing that no act or negligence of the owner of the property shall invalidate the insurance, is an independent contract between the insurance company and the mortgagee. And no act or omission of the mortgagor will invalidate the policy, whether it occurs before, at the time of, or subsequently to the issuance of the policy: *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774; note to *Oakland Home Ins. Co. v. Bank of Commerce*, 58 Am. St. Rep. 672.

LEE v. BURLINGTON.

[118 Iowa, 856, 85 N. W. 618.]

NEGLIGENCE—DAMAGES FOR FRIGHT.—NO RECOVERY can be had for injuries either to a person or an animal resulting from fright caused by the negligence of another, where no immediate personal injury is received. (p. 879.)

Stutsman & Stutsman, for the appellant.

George S. Tracy, for the appellee.

³⁵⁶ **DEEMER, J.** The negligence alleged is that defendant failed to erect barriers or guards to prevent people driving on the streets where the roller was being operated; failed to give warning to persons going on the street of the danger; started the roller by blowing off steam and smoke, and making a loud noise, in such a manner as to frighten plaintiff's horse; and failed to stop the roller after defendant knew ³⁵⁷ that plaintiff's horse was frightened. It is also alleged that by reason of these negligent acts plaintiff's horse was frightened, causing a rupture of the heart and the death of the horse, "so determined by a post mortem examination by a veterinary surgeon." Defendant claims that it had the right to operate the roller in the ordinary manner, and that if plaintiff's horse was injured thereby, it was *damnum absque injuria*, and that the claim of death from fright is too speculative, remote, and contingent to furnish the basis of an action for damages.

For the purpose of the case, it may be assumed that the defendant was negligent, and the sole question then is, Is defendant liable for the death of the horse caused through fright alone? If there had been any physical injury to the horse due to defendant's negligence and resulting in death, there would undoubtedly be liability. But where death results from fright alone the defendant is not liable in damages, since such a result is so unusual and extraordinary that one ought not to be held liable therefor. As a general rule, no recovery may be had for injuries resulting from fright caused by the negligence of another, where no immediate personal injury is received. This is the settled rule as to human beings: *Cleveland etc. Ry. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep.

604, 45 N. E. 354; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Ewing v. Pittsburgh etc. Ry. Co., 147 Pa. St. 40, 30 Am. St. Rep. 709, 23 Atl. 340; Spade v. Lynn etc. R. R. Co., 168 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88; Kalen v. Terre Haute etc. R. R. Co., 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; and we see no reason why the same rule should not be applied to animals: See, also, Mahoney v. Dankwart, 108 Iowa, 321, 79 N. W. 134. Although possessed of the most vivid imagination, one could hardly anticipate such results as are said to have followed from the fright of the horse. It was such an unusual occurrence that the law will not consider it the proximate result of the alleged negligence. ³⁵⁸ Damages, to be recoverable, must be such as, in the ordinary course of things, naturally follow from the act complained of. This conclusion renders a decision of the other points made by the defendant unnecessary. The ruling was right, and it is affirmed.

Damages for Fright.—There can be no recovery of damages for fright alone, which is neither accompanied nor followed by injury: See the monographic note to Gulf etc. Ry. Co. v. Hayter, 77 Am. St. Rep. 860.

STATE v. STORMS.

[118 Iowa, 385, 85 N. W. 610.]

CONFESSIONS WHICH ARE NOT VOLUNTARILY MADE, but are extorted through hope or fear caused by inducements held out to the prisoner, are not competent evidence against him. (p. 384.)

CONFESSIONS—QUESTION OF LAW.—Whether a confession is voluntary or not is usually a question to be determined by the court. (p. 384.)

CONFESSIONS — VOLUNTARY — WHEN QUESTION OF FACT.—Where there is a conflict of evidence, and the court is in doubt whether the confession is voluntary or not, the inquiry should be left to the jury with instructions to disregard the confession if it is not voluntary. (p. 384.)

WHERE A CONFESSION APPEARS ON ITS FACE TO BE FREE AND VOLUNTARY, the burden is on the accused to show that it is incompetent. (p. 384.)

WHERE A CONFESSION DOES NOT ON ITS FACE APPEAR TO BE FREE AND VOLUNTARY, and there is a general objection that it was made under promises, threats, or fear, the burden is on the state to show that it was freely made. (p. 384.)

CONFESSIONS.—ADJURATION TO TELL THE TRUTH is not sufficient to justify the rejection of a confession. (p. 384.)

THE FACT THAT A CONFESSION WAS INDUCED BY ARTIFICE, DECEPTION, OR FRAUD is no ground for excluding it. (p. 384.)

CONFESSIONS.—FEAR OF THE ULTIMATE CONSEQUENCES of a crime will not make a confession involuntary. (p. 384.)

CONFESSIONS.—THE FACT THAT A PRISONER IS IN CUSTODY is not such undue influence or fear as will invalidate a confession. (p. 384.)

IF A CONFESSION IS OBTAINED BY ANY SORT OF THREATS OR VIOLENCE, or by any direct or implied promises, however slight, or by the exertion of any improper influence, it is inadmissible in evidence. (p. 384.)

THE FACT THAT A CONFESSION WAS MADE TO A PUBLIC OFFICER WHILE THE ACCUSED WAS UNDER ARREST, in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, though it may be considered in determining the question. (p. 385.)

APPEAL—CONFESSIONS.—THE DETERMINATION OF A TRIAL JUDGE that a confession is voluntary will not be reviewed on appeal, unless there was manifest error. (p. 385.)

CONFESSIONS—VOLUNTARY.—WHERE NO THREATS ARE MADE, and no promises or inducements held out, and the fear of the accused, if any, arose from other causes than the conduct of the officers having him in charge, a confession made is voluntary. (pp. 385, 386.)

Babb & Babb and Palmer & Kopp, for the appellant.

C. W. Mullan, assistant attorney general, and Charles A. Van Vleck, assistant attorney general, for the state.

³⁸⁶ DEEMER, J. The conviction was secured largely on alleged confessions made by defendant to the chief of ³⁸⁷ police of the city of Burlington, at which place the crime was committed, and to the county attorney of Des Moines county. It is strenuously insisted that the court erred in admitting these confessions in evidence, for that the same were not free and voluntary, but were extorted by coercion, torture, threats, and promises. The facts relied upon to establish the voluntary character of the confession are, in substance, as follows:

The crime is said to have been committed on Sunday evening, January 23, 1898. Defendant was at that time twenty-eight years of age, and had had considerable business and other experience. He was arrested Saturday, January 29th, at about 3 o'clock in the afternoon, and taken to the police station. There he was placed in a cell about six by eight feet, which was devoid of furniture, and had nothing for a bed except two boards nailed together and supported at either end by cleats. Here he was kept until the alleged confession was

made, some time about half-past 4 o'clock the following Monday morning. About 10 o'clock Saturday evening he was taken to the office of the chief of police, and there examined by the mayor and other officers of the city regarding his whereabouts on the Sunday and Monday previous. The chief of police was absent from the city, and did not return until about 11:30 on Saturday evening. On his return he went immediately to his office, where defendant and others were. He (the chief) soon learned that defendant and some five others were arrested for the crime, and was told regarding the examination of the defendant by the mayor and others. During the night, Greiner, the chief of police, had all the suspects before him from time to time, and he examined and cross-examined the defendant regarding his whereabouts before, at the time of, and after the crime is said to have been committed. At the first or second examination defendant was thoroughly searched, and his undershirt was taken from him and kept for use as evidence. A pocket-knife was also taken from him, as we understand it, but this was not done until he made his confession. Sunday ³⁸⁸ forenoon the defendant was again brought into the presence of the chief of police, and again catechised regarding his whereabouts at different times at and about the time the crime is said to have been committed. As we understand it, he was brought before the chief of police twice Sunday morning, and about the same questions asked each time. Defendant was slow about answering, sometimes delaying for more than fifteen minutes. Sunday afternoon defendant was again brought before the chief of police, and, after going through much the same process, the chief, about 4:30 o'clock in the evening, took the defendant to the morgue where the dead bodies of the victims of the murder were lying. He was handcuffed when he left the office, and so remained until he was returned to the jail. With the chief of police and defendant were two of the city aldermen. The morgue was about three blocks from the jail, and the bodies of the murdered women were lying in the second story of the building, which was used as a morgue. Defendant was taken past the bodies which were lying close to him, and no doubt all present closely scrutinized his manner and demeanor at the time. After the return from the morgue defendant was again taken to the chief's office, and kept there until about dark, when he was returned to his cell. As he was being conducted to his cell, he asked the chief to step to one side, and

said he wanted to talk to him. He (the chief) responded that he had been talking with him "a whole lot," "and you are contradicting yourself, and if you will talk to me right I will talk to you." About 11 o'clock Sunday evening defendant was again taken before the chief of police, and remained in his room until 4:30 or 5 o'clock Monday morning. Shortly after coming before the chief the last time he asked him (the chief) why it would not be just as well to plead guilty or "say he was guilty." The chief said: "No; that he wanted to know if anyone else was implicated in the crime." Very much talk was indulged in from that time until the confession ^{was} is said to have been made, very little of which is material, save that defendant asked to see an attorney, and said that if the attorney advised him to tell about the crime he would do it. The chief said the attorney would be there Monday morning to see him. The attorney had been there on Sunday, as we understand it, but was not allowed to have any private conversation with him (the defendant). He did tell the defendant, however, that he (the attorney) had been employed to look after his (defendant's) interests. During the Sunday night interview the chief showed the defendant some old revolvers and other relics that he had in his office. Shortly after making the remark regarding his attorneys, defendant grew sullen, and refused to talk. The chief thereupon got up to go out of the room, and defendant called him back. In a short time the defendant made a confession regarding his connection with the affair, and gave all the details thereof. The chief cross-examined him while the confession was being made, and at its conclusion sent for Mr. Clark, the county attorney. The county attorney came as soon as he could after being called, and when he came the defendant was informed that he was the county attorney, and for him to make his statement, that it might be taken in writing. Defendant gave an account of his whereabouts on the Sunday the crime is said to have been committed, but did not fully state all the matters he had related to the chief of police, and Mr. Clark arose, put on his overcoat, and started to leave, when defendant said, "Hold on; I will tell you all about it." Shortly thereafter he made a full confession to Clark, which was taken down in writing, sworn to by defendant, and witnessed by two witnesses. It is this confession, as well as the oral one made to the chief of police, which is claimed was involuntarily made. The written confession was read over to the defendant at least

twice, and Clark asked him several times before he made it if it was his free and voluntary act, and if any promises or inducements were held out to him to induce him to ³⁹⁰ make it; to which he responded there were no inducements, and that it was his free and voluntary act. Something was said about defendant's attorney, and he was informed that his attorney would be there in the morning. There is a conflict in the evidence regarding defendant's condition the next morning, and, in view of this conflict, we cannot say there was anything in his after-appearance indicating that the confession was involuntary.

Such, in brief, is the testimony relating to the confession. The trial court heard it at first, the jury being excluded, and, finding that the confessions were *prima facie* admissible, directed the jury to be recalled, and all the evidence relating to the confession was read in its presence.

The question of law presented, and the only one for our consideration, relates to the admission of these confessions in evidence. It is evident there were no promises or other inducements held out to defendant to elicit a confession. His statements, oral and written, if not voluntary, were brought about through fear or torture, and it is with that question we have to deal. Confessions which are not voluntarily made, but are extorted through hope or fear caused by inducements held out to the prisoner, are not competent evidence against him. Whether confessions proposed to be introduced in evidence against a prisoner are of the character just indicated is a question to be determined by the court: *State v. Fidment*, 35 Iowa, 541. But where there is a conflict of evidence, and the court is left in doubt on the question, the inquiry should be left to the jury, with the direction to disregard and reject the confession, if, upon the whole evidence, they are satisfied that the confession was obtained through improper influences: *Commonwealth v. Cuffee*, 108 Mass. 285; *People v. Howes*, 81 Mich. 396, 45 N. W. 961; *Burdge v. State*, 53 Ohio St. 512, 42 N. E. 594. Where the confession appears on its face to be free and voluntary, as the one made by the defendant in this case, the burden is on the defendant to show ³⁹¹ that it is incompetent: *Rufer v. State*, 25 Ohio St. 464. In the absence of such a showing, the weight of authority seems to be that, when there is a general objection that the confession was made under promises, threats, or fear, the burden is on the state to show that it was freely and voluntarily made: *Bradford*

v. State, 104 Ala. 68, 53 Am. St. Rep. 24, 16 South. 107; People v. Rodriguez, 10 Cal. 50. Adjuration to tell the truth is not sufficient to justify the rejection of the confession: Sparf v. United States, 156 U. S. 51, 15 Sup. Ct. Rep. 273; Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494; King v. State, 40 Ala. 314. The fact that the confession was induced by artifice, deception or fraud will not exclude: People v. Barker, 60 Mich. 279, 1 Am. St. Rep. 501, 27 N. W. 539; State v. Staley, 14 Minn. 105; Heldt v. State, 20 Neb. 492, 57 Am. Rep. 835, 30 N. W. 626. Fear of ultimate consequences of the crime will not be sufficient: Allen v. State, 12 Ill. App. 190; People v. Wentz, 37 N. Y. 304. And the mere fact that the prisoner is in custody will not amount to undue influence or fear: State v. McLaughlin, 44 Iowa, 82; Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494. That the prisoner was manacled had no bearing: Hopt v. People, 110 U. S. 574, 4 Sup. Ct. Rep. 202. In People v. Johnson, 2 Wheel. C. C. 261, it was held no valid objection that defendant had been called upon to touch the deceased's body. But if the confession is obtained by any sort of threats or violence, or by any direct or implied promises, however slight, or by the exertion of any improper influence, it is inadmissible. Inquisitorial proceedings, which, directly or indirectly, menace the life or safety of the prisoner, and are calculated to produce such a state of mind as that the answers given to the questions propounded are not free and voluntary, will not be tolerated. But the showing must be such as to induce the belief that the statements were the result of an involuntary condition of mind. As said by Fuller, C. J., in Wilson v. United States, 162 U. S. 613, 16 Sup. Ct. Rep. 895: "In short, the true test of admissibility is ³⁹² that the confession is made freely, voluntarily, and without compulsion or inducement of any kind." The fact that the confession was made to a public officer while the accused was under arrest, in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment may be taken into account in determining whether or not the statement of the prisoner was voluntary: Hopt v. People, 110 U. S. 574, 4 Sup. Ct. Rep. 202.

We have already said that the confession in this case is presumed to have been voluntary, and that the defendant was called on to introduce enough evidence to rebut this presumption. It was the province of the judge to determine,

as a preliminary question, whether the confessions were made with that degree of freedom to justify their admission in evidence, or, in case of doubt and of a conflict in the evidence, to submit the question to the jury, under proper instructions, and unless there was manifest error in admitting them in evidence, this court will not interfere: *Fife v. Commonwealth*, 29 Pa. St. 429. The matter rests peculiarly in the sound discretion of the trial judge, and, while his decision is subject to review, this court will not reverse on a question of fact, unless the finding is manifestly against the weight of the evidence. The trial court saw and heard the witnesses, and had better knowledge of the facts than we can possibly have; hence its conclusion will not be disturbed, unless clearly and manifestly erroneous: *State v. Staley*, 14 Minn. 110; *Bartley v. People*, 156 Ill. 228, 40 N. E. 831; *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. 494; *State v. Gorham*, 67 Vt. 367, 31 Atl. 845; *Fife v. Commonwealth*, 29 Pa. St. 429; *People v. Wentz*, 37 N. Y. 305.

Now, in the case at bar no threats were made, and no promises or inducements held out. The fear, if any, under which defendant labored, arose from other causes than the conduct of the officers having him in charge. He was searched, his clothing removed, and his undershirt kept by the chief of police, but this was not unusual ³⁹³ or extraordinary. He was handcuffed, and taken in the presence of the dead bodies of the victims, but this would not produce fear in and a confession from an innocent man. When returned to the jail, he said to the chief of police that he wished to talk with him, and he was returned to the chief's office pursuant to this request. He was told by counsel that he had been employed to look after his interests, and, while counsel was not allowed to talk with him privately on Sunday afternoon, defendant was told that he could see him Monday morning, and at the time the written confession was made was again informed of that fact. He made no request to see counsel after being informed of these facts. When brought before the chief of police, Sunday evening, pursuant to his own request, he was not "brow-beaten" or unduly questioned by that officer. The talk was general, and the firearms shown him were relics that were explained, and their history given. He was in no way threatened therewith. Much of the time while before the chief on Sunday evening defendant was smoking. He was questioned regarding his whereabouts and, when he asked about pleading

guilty, the chief said: "No; he wanted to know who else was with him." When the confession was made, there was no questioning. The prisoner gave a connected account of the entire transaction. When the county attorney came, he asked the defendant if his confession had been freely made, and if any inducements had been offered, and defendant said, "No." When the county attorney started to leave during a break in the confession, the prisoner called him back, and said, "I will tell you what I know." After making the written confession, he asked the county attorney if he could not make him some kind of a promise, and the county attorney said, "No." While making this confession, the defendant was not apparently excited, but sat smoking a cigar most of the time. He was advised by a fellow prisoner that the best way out was to plead guilty, and trust to the mercy of the court. The material parts of the confessions correspond with the proven facts, ³⁹⁴ and, as defendant was not informed by anyone as to what the evidence against him was, this should be regarded as a strong circumstance tending to show the truth of the statement, and that it was not manufactured out of fear, or by reason of the inquisitorial character of the proceedings.

In view of this record, and of the evidence on which the trial court acted in admitting the confessions, we are not prepared to hold that it abused its discretion, or that the confessions were obtained in such a manner as that they should be excluded. All of the evidence was submitted to the jury under proper instructions, and the defendant had the benefit of the showing made. The case is not stronger in its facts than the following, where confessions were held voluntary: *Commonwealth v. Cuffee*, 108 Mass. 287; *Commonwealth v. Smith*, 119 Mass. 311; *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. 494; *Sparf v. United States*, 156 U. S. 52, 15 Sup. Ct. Rep. 273; *People v. Wentz*, 37 N. Y. 304; *Roesel v. State*, 62 N. J. L. 227, 31 Atl. 408; *State v. Trusty*, 1 Penne. (Del.) 319, 40 Atl. 766; *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51, (which is a very strong case); *Commonwealth v. Chance*, 174 Mass. 248, 75 Am. St. Rep. 306, 54 N. E. 551. We will not take the space needed to quote from these cases in support of our holding. It is sufficient to say that they fully sustain the conclusion reached. In *Flagg v. People*, 40 Mich. 706, defendant was told by the officers having him in charge that the best thing he could do was to own up. Defendant in that case was weak-minded, and the

officers also gave him some intoxicating liquor before he made his confession. In *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044, defendant was placed in a dungeon and kept there for six days, and was taken out from time to time, and asked if he would confess. On his refusal to do so, he was returned. Finally he made the confession that was rejected: *Gallaher v. State*, 40 Tex. Cr. App. 296, 50 S. W. 388, also relied on by appellant, is based on a statute, and is easily distinguishable. *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. Rep. 183, 395 is the strongest case cited by the appellant, and if the rule there announced were followed, it would call for a reversal of this judgment. We do not regard the majority opinion as sound, and in this we are not alone: See *State v. Trusty*, 1 Penne. (Del.) 319, 40 Atl. 766; *Roessel v. State*, 62 N. J. L. 227, 31 Atl. 408; and *Greenleaf on Evidence*, Wigmore's notes, sec. 213; also *Greenleaf on Evidence*, note 10, sec. 219. We prefer the dissenting opinion of Justice Brewer filed in that case. While there are other cases that would seem to call for a reversal of the judgment, the ones we have cited abundantly sustain our position, and seem to announce the more modern and more sensible rule. As said by Earl, J., in *Regina v. Baldry*, 2 Denison & P. C. C. 430: "In many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt." Courts have frequently gone to the extreme in their anxiety to protect the defendant's rights, unmindful of the fact that the peace and good order of society should also be protected. We do not think there was such an abuse of discretion in the trial court in admitting the confessions as to justify us in interfering.

Affirmed.

Confessions as evidence are discussed in the monographic notes to *Daniels v. State*, 6 Am. St. Rep. 242-251; *State v. Clifford*, 41 Am. St. Rep. 522-524; *Nolen v. State*, 46 Am. Rep. 253-260; *Heldt v. State*, 57 Am. Rep. 839-842. In order to be admissible in evidence, confessions must be voluntary: *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51; *Bradford v. State*, 104 Ala. 68, 53 Am. St. Rep. 24, 16 South. 107. As to what confessions are voluntary and admissible, see *Bracken v. State*, 111 Ala. 68, 56 Am. St. Rep. 23, 20 South. 636; *Tabor v. State*, 34 Tex. Cr. Rep. 631, 53 Am. St. Rep. 726, 31 S. W. 662. Statements procured by threats or intimidation of peace officers are inadmissible: *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51. But artifice in obtaining a confession does not render it inadmissible: *Commonwealth v. Goodwin*, 186 Pa. St. 218, 65 Am. St. Rep. 852, 40 Atl. 412. The

question of admissibility is generally for the court, yet where there is a conflict in the testimony or room for doubt, the court should submit the question to the jury with proper instructions: Note to Daniels v. State, 6 Am. St. Rep. 244. As to the burden of proof to show that a confession is voluntary, see the note to Daniels v. State, 6 Am. St. Rep. 244, 245.

STATE v. EASTON.

[118 Iowa, 516, 85 N. W. 795.]

BANKS—INSOLVENT—RECEIVING DEPOSITS.—A statute declaring that any officer or member of a bank or firm or corporation doing a banking or deposit business who, knowing of the insolvency of such bank, firm, or corporation, shall receive, or connive at receiving, any deposit therein, is guilty of a felony, applies to all persons, corporations, and associations receiving deposits of money. (pp. 390, 391.)

CONFLICT OF LAWS—CRIMES.—WHERE AN ACT IS AUTHORIZED TO BE DONE BY A LAW OF THE UNITED STATES, such act is thereby withdrawn from the operation of the criminal laws of a state, unless otherwise expressly provided by Congress. (p. 391.)

FRAUDULENT BANKING — INSOLVENT NATIONAL BANKS—DEPOSITS.—A STATE STATUTE making it a felony for any officer of a bank to receive deposits therein, knowing that the bank is insolvent, is applicable to national banks. (p. 391.)

INDICTMENT—SETTING ASIDE.—FAILURE TO SWEAR. A WITNESS BEFORE THE GRAND JURY is no ground for setting aside an indictment, since it is not one of the grounds prescribed by the statute, and especially where the fact testified to by the witness is not disputed. (p. 392.)

FRAUDULENT BANKING.—AN INDICTMENT charging that the defendant was president of the bank known as the "First National Bank of Decorah" sufficiently shows that it was an incorporated national bank. (p. 392.)

FRAUDULENT BANKING—CHARGING TWO OFFENSES. AN INDICTMENT charging a president of a bank with receiving deposits knowing of the bank's insolvency, and also with permitting and encouraging the deposits, charges but one offense, since it does not allege a permitting or encouraging of deposits to anyone but to himself. (p. 393.)

EVIDENCE.—BOOKS OF A BANK, kept under the supervision of the defendant, are admissible to show both the condition of the bank and the defendant's knowledge of such condition, although they may not be admissible as books of account. (p. 393.)

EVIDENCE OF THE VALUE OF NOTES held by a bank are admissible for the purpose of showing the insolvent condition of the bank. (p. 393.)

THE REFUSAL TO GIVE INSTRUCTIONS ASKED FOR is not error where, in so far as they were correct, they were fully covered by those given. (p. 393.)

J. B. Powers, Dan Shea, Clements & Clements, and H. T. & C. W. Reed, for the appellant.

Milton Remley, attorney general, H. P. Hancock, county attorney, E. P. Johnson, and James H. Trewin, for the state.

⁵¹⁸ GIVEN, C. J. 1. On and for a long time prior to August 26, 1896, the defendant was the president and general manager of the First National Bank of Decorah—a bank duly authorized to transact business at Decorah as a national bank, under the laws of Congress. On said twenty-sixth day of August, 1896, the defendant received from John French on deposit in said bank one hundred dollars in money, for which he executed to Mr. French a certificate of deposit payable six months after date, with interest at four per cent. “No interest after maturity.” The bank was then open and transacting business in the usual manner and continued to do so until about November 10, 1896, when it was found to be insolvent and was put into the hands of a receiver. While the questions of the insolvency of the bank, and of defendant’s knowledge on that subject at the time this deposit was received, are in issue, the jury was fully warranted in finding that the bank was then insolvent, and that the defendant knew that fact when he received the deposit. The extent of the liabilities of the bank, the character of its assets, including a large liability against the defendant, and defendant’s active ⁵¹⁹ control and management of the bank, leave no room for debate on these issues.

2. Appellant’s counsel present two propositions, as follows: “1. Does the statute of Iowa prohibiting banks or their officers or agents from accepting and receiving deposits when such banks are insolvent apply to national banks organized and doing business under and in pursuance of the laws of the United States? 2. If sections 1884 and 1885 of the code be held to apply to national as well as state and private banks or bankers, then are they valid in so far as they apply to national banks organized and conducting business under the laws of Congress?” Section 1884, chapter 12, title 9 of the code provides that “no bank, banking-house, exchange broker, deposit office, firm, company, or corporation doing a banking or deposit business shall, when insolvent, accept or receive on deposit any money, bank bills, United States treasury notes, or currency,” etc. Section 1885 provides as follows: “If any such bank, banking-house, exchange broker,

deposit office, firm, company, corporation, or person shall receive or accept on deposit any such deposits, as aforesaid, when insolvent, any owner, officer, director, cashier, manager, member, or person knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit, or connive at receiving or accepting on deposit therein, or thereby, any such deposits, or renew any certificate of deposit, as aforesaid, shall be guilty of a felony," etc. Chapter 10 of said title 9 provides for the organization of savings banks, chapter 11 for the organization of state banks, and chapter 12, in addition to said sections 1884 and 1885, provides how such banks shall be managed and controlled. Appellant insists that said sections 1884 and 1885 only apply to the banks provided for in said title 9. The language of said section includes many other than savings and state banks, and the construction contended for would exempt all these others from the prohibitions and penalties ⁵²⁰ of said sections, which would leave the public unprotected as against such frauds by brokers, private bankers, and others than savings and state banks that conduct a deposit business. These sections were originally enacted as chapter 153 of the laws of eighteenth general assembly, and re-enacted in the code, with slight changes, as a part of said chapter 12. They might more properly have been placed in the criminal statutes, but the fact of their re-enactment as part of chapter 12 does not warrant the restriction claimed. We are in no doubt but that the legislative intent is that said sections shall apply to all persons, corporations, and associations receiving deposits of money: See *State v. Fields*, 98 Iowa, 748, 62 N. W. 653.

3. Appellant contends in support of his second proposition that said sections 1884 and 1885 of the code of Iowa are invalid as to national banks—in other words, they do not apply to national banks. The argument is that under the laws of Congress such banks are authorized to receive deposits, and that, "where an act is authorized to be done by a law of the United States, such act is thereby withdrawn from the operation of the criminal laws of the state, unless otherwise expressly provided by Congress, and that the performance of such act in pursuance of, and as authorized by, such law of the United States cannot be punished as an offense against any law of the state." This statement of the law is in substantial accord with the authorities, and the inquiry is whether the defendant was authorized by the laws of Congress to do

the act of which he has been convicted. This inquiry, we think, is directly answered in *State v. Fields*, 98 Iowa, 748, 62 N. W. 653. We understand appellant's counsel to concede that the case is against their contention, but they insist that it is against the weight of authorities—especially certain cases decided since that opinion was rendered, namely, *State v. Thomas*, 173 U. S. 276, 19 Sup. Ct. Rep. 453, and *In re Waite*, 81 Fed. 359. We do not find that this precise question has ever been ⁵²¹ passed upon by the supreme court of the United States—the only tribunal that may render a final determination of it. In the absence of such a decision, we follow the law announced in *State v. Fields*, 98 Iowa, 748, 62 N. W. 653, without reviewing the authorities and reasons upon which it is based.

4. One ground of defendant's motion to set aside the indictment was that Thomas Rice was examined before the grand jury without being sworn as required by law. Mr. Rice was foreman of the grand jury. He was sworn by one of the jurors, and testified only that the defendant had been president of the bank for many years. There had been no dispute as to this fact at any time, and we fail to see wherein the defendant was prejudiced by reason of Mr. Rice's not being sworn as provided in sections 5254, 5255, and 5260 of the code. This is not a ground for setting aside an indictment: Code, sec. 5319. The grounds prescribed in that section are exclusive of others: *State v. Baughman*, 111 Iowa, 71, 82 N. W. 452. Another ground of said motion is that certain exhibits before the grand jury as evidence were not returned with the indictment, as required by section 5280 of the code. The exhibits referred to are said certificate of deposit and a receipt given by defendant to one Grow. French and Grow testified concerning these documents, but it does not appear that either document was before the grand jury. There was no error in overruling the motion on either of these grounds.

5. A ground of demurrer to the indictment was, that it is indefinite and uncertain, and does not charge any offense with the required certainty. It is argued that the indictment fails to show whether the bank was a corporation, partnership, or name under which an individual was doing business. The indictment charges that defendant was president of the bank known as the First National Bank of Decorah. "Construed in their usual acceptation in common language," these

words of the indictment show that this was an incorporated national bank: Code, sec. ⁵²² 5287. As we construe said sections 1884 and 1885, the defendant's guilt does not depend upon the character of the organization of the bank. Another ground of the demurrer was that the indictment charges two offenses—namely, the permitting, conniving at, and encouraging the receipt and acceptance of the deposit, and also receiving the same. To receive or accept a deposit, knowing the bank to be insolvent, is an offense; and to be accessory or permit or connive at receiving or accepting a deposit by another, knowing the bank to be insolvent, is also an offense. The indictment charges a receiving by the defendant, and what is said as to his permitting, conniving at, and encouraging the deposit is not that it was given to another but to himself. The indictment does not charge two offenses, for that it does not charge that defendant permitted, connived at, or encouraged the giving of the deposit to another. There was no error in overruling the demurrer on these grounds.

6. The court admitted in evidence, over defendant's objection, books of the bank, as bearing upon the question of insolvency, and the defendant's knowledge thereof. Defendant insists that these were not books of account or of original entries, and therefore not admissible. They were not admitted as books of account, and were not offered as such. They were books kept under the supervision of the defendant to show the condition of the bank, and the entries therein were accessible to and known by him, therefore they were admissible not only to show the condition of the bank, but also defendant's knowledge as to its condition. The authorities cited as to the rule applicable to books of account are not in point. It is also contended that the court erred in admitting the evidence of the receiver and others as to the value of certain notes held by the bank. The condition of the bank depends upon the value of its assets, and there was no better way of proving the value of these notes. We find no error in the admission of evidence.

⁵²³ 7. Appellant's remaining contention is that the court erred in refusing certain of the instructions asked, and in giving the sixteenth paragraph of the charge. In so far as those asked were correct, they were fully covered by those given. Said sixteenth instruction relates to a claim held by the bank, and was really favorable to the defendant. We do not find any error in the giving or refusing instructions.

It follows from the conclusions we have reached that the judgment of the district court must be affirmed.

Fraudulent Banking.—The legislature may make it a criminal offense for a banker to receive a deposit, knowing the bank to be insolvent: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 249. As to what amounts to a criminal receipt of a deposit, see *State v. Shove*, 96 Wis. 1, 65 Am. St. Rep. 17, 70 N. W. 312; *State v. Elfert*, 102 Iowa, 188, 63 Am. St. Rep. 433, 65 N. W. 300, 71 N. W. 248. And as to the sufficiency of an indictment for fraudulent banking, see *Meadowcraft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303; *State v. Elfert*, 102 Iowa, 188, 63 Am. St. Rep. 433, 65 N. W. 309, 71 N. W. 248.

BRADSHAW v. FRAZIER.

[118 Iowa, 579, 85 N. W. 752.]

ABUSE OF PROCESS.—WHERE, IN THE EXECUTION OF A WRIT OF REMOVAL, a child afflicted with measles is put out of doors on a cloudy, cold, and windy day, and dies a few days later by reason of the exposure, such facts are sufficient to support a finding that there was an abuse of process. (p. 395.)

ABUSE OF PROCESS—CERTIFICATE OF PHYSICIAN.—In an action to recover damages for an abuse of legal process in removing a sick child from a house, the certificate of a physician that she was able to be moved is not a complete defense as a matter of law. (p. 396.)

ABUSE OF PROCESS—CONTRIBUTORY NEGLIGENCE.—Where a child dies as the result of exposure caused by the execution of a writ of removal, it is no defense that the parents were guilty of contributory negligence in caring for such child after the exposure. (p. 396.)

ABUSE OF PROCESS.—ONE WHO PARTICIPATES IN THE UNLAWFUL ACTION of a constable in executing a writ of removal is responsible for its consequences. (p. 396.)

Charles J. Donnelly and James C. Hume, for the appellant.

McHenry & McHenry and W. A. Connolly, for the appellee.

580 **SHERWIN, J.** The plaintiff is the administrator of the estate of Georgia Frazier, deceased. Georgia Frazier was the daughter of the defendant's son, and at the time of her death was twelve years old. Her father was dead and her mother had remarried. Her stepfather's name was Brown, with whom and her mother she was living at the time of the transactions in question and at the time of her death. Mrs.

Brown and her children had inherited from her deceased husband a small piece of land, upon which there was a small frame house. Before her marriage to Brown, Mrs. Frazier had rented the house on this land to the defendant, Frazier, her father in law, taking his note for thirty dollars in payment of the rent. His lease expired in the spring of 1897.⁵⁸¹ In June, 1896, Mrs. Frazier and Mr. Brown were married. In August following the house was vacant, and Brown and his family moved into it. Before doing so, however, Brown had attempted to arrange with the defendant for occupying it, but the defendant demanded the payment of thirty dollars rent, and they never came to any agreement on the subject. After the family moved into the house Brown and the defendant had several altercations over the matter, but Brown would neither pay rent nor vacate. The defendant brought an action of forcible entry and detainer against Brown, and obtained a judgment therein about the first of September, 1896. Somewhere from the seventh to the ninth of the month a writ of removal was issued on the judgment, and placed in the hands of a constable for service. The defendant went with the officer to the house and remained there until the family were ejected therefrom. Georgia Frazier had for some days before the ejection been sick with the measles. The defendant knew of her sickness, knew that her condition had been such that it was not safe to move her before, and had caused his attorney to procure a certificate from her attending physician that she had so far recovered that removal from the premises would not injure her health. The evidence fairly shows that the real purpose in procuring this certificate was to convince the officer who was expected to make the ejectment that it could safely be done. When the defendant, with the constable and posse which the defendant himself had collected to accompany them, arrived at the house, Brown was away, but Mrs. Brown and her children were there. Georgia was able to sit up for a short time only, and was still badly broken out, the eruptions being plainly visible on the exposed part of her person. The evidence tends to prove that the day was cloudy, cold, and raw, with considerable wind. The defendant immediately ordered the constable to eject the entire family. Mrs. Brown told him that Georgia was too sick to be moved, and asked that they be permitted to stay on her account, but to the mother's plea⁵⁸² for her sick child, his own flesh and blood, he turned a deaf

ear, and still insisted upon the prompt execution of the court's mandate. The only fire in the house was then put out with water. After this was done, the constable, notwithstanding the repeated orders of the defendant to proceed with the discharge of his supposed duty, told Mrs. Brown that he would not put them out until her husband came. The husband returned about an hour thereafter, and upon his return the ejection was completed. Georgia was wrapped in a shawl and heavy stockings were drawn over her feet by her mother, and she went into the yard with the household goods. Her mother's efforts to have her taken into neighboring houses were without avail, because of the contagious nature of her affliction. After remaining in the yard about an hour and a half she was taken in a buggy to the house of her aunt, five miles distant. Before starting for the aunt's she complained of being cold and sick, and from that time she declined rapidly, until death relieved her, some nine or ten days thereafter. The facts which we have narrated all find support in the record before us. That her death was caused by this exposure in the cold house and in the yard find abundant support in the evidence, and the controlling question we have for determination is whether the facts recited, if true, are sufficient to support a finding that there was an abuse of process in the case.

We are clearly of the opinion that they are. It is conceded that the writ of removal was lawful, and, on the other hand, it is virtually conceded that there may be cases where damages may be recovered for an abuse in the service or execution of the writ. Numerous cases may be found in the books where it is held an abuse of process, rendering the officer liable for damages, to handle goods in a rough or improper manner, or to wholly or partially destroy them: *Syndacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551; *Murray v. Mace*, 41 Neb. 60, 43 Am. St. Rep. 664, 59 N. W. 387; *Cooley on Torts*, 462. It is an abuse of lawful process "if, after arrest upon civil or criminal process, the party arrested is subjected to unwarrantable ~~583~~ insult or indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardships": *Wood v. Graves*, 144 Mass. 366, 59 Am. Rep. 95, 11 N. E. 567; *Smith v. Weeks*, 60 Wis. 94, 18 N. W. 778; *McLaughry v. Porter*, 33 N. Y. Supp. 464, 86 Hun, 316. See, also, *Slatten v. Des Moines etc. R. R. Co.*, 29 Iowa, 148, 4 Am. Rep. 205.

Our own statute so far protects the defendant in cases of this kind as to provide that no removal shall be made except

in the daytime. Probably no Iowa lawmaker ever conceived the idea that a writ would be executed at the expense of human life, and consequently our statute is free from the imputation that such a prohibitory act would create. But, without such a statute, there can be no doubt that the law will more carefully guard the health of a human being than it will personal property; otherwise, it would not deserve the respect of the meanest inhabitant of the state. Nor is the certificate of the physician which we have referred to a legal shield for the defendant. The evidence is conflicting as to when it was issued in fact, and as to the examination made by him before issuing it. It was proper for the jury to consider it in determining the issues presented, but the court should not say as a matter of law that it was a complete defense. It is claimed there was contributory negligence on the part of the parents of the deceased girl, and on the part of the relatives with whom she remained for a few days after the ejection. This is not a defense in this case: *Wymore v. Mahaska County*, 78 Iowa, 396, 16 Am. St. Rep. 449, 43 N. W. 264. Nor was it a ground in the motion for a directed verdict. If the defendant participated in the unlawful action of the constable, he is responsible for its consequences: *Cooley on Torts*, 468; *Hyde v. Cooper*, 26 Vt. 552.

There was sufficient evidence to take this case to the jury, and the court erred in directing a verdict for the defendant. The judgment is therefore reversed.

WHAT IS AN ABUSE OF LAWFUL PROCESS AND THE LIABILITY THEREFOR.*

I. What is an Abuse of Process.

a. Nature and Elements.

b. Civil Process.

1. Execution and Attachment.

A. Generally.

B. Injury to or Misuse of Property.

C. Exempt Property.

2. Distress Warrant.

3. Summons and Subpoena.

4. Writs of Replevin and Possession.

5. Foreclosure and Sale.

c. Criminal Process.

1. Cases of Arrest.

2. Criminal Process to Collect Debt.

*REFERENCE TO MONOGRAPHIC NOTE.

Abuse of process, trespass ab initio: 14 Am. Dec. 365-369.

II. Liability for Abuse of Process.**a. Who is Liable.****b. Remedies.****1. In General.****2. Damages.****I. What is an Abuse of Process.**

a. Nature and Elements.—The abuse of process which we shall consider in this note consists in the employment of legal process for some unlawful object not the purpose intended by law. It is the perversion of legal process for some ulterior purpose: *Mayer v. Walter*, 64 Pa. St. 283; *Nix v. Goodhill*, 95 Iowa, 282, 58 Am. St. Rep. 434, 63 N. W. 701. "A malicious abuse of legal process," said the court in *Bartlett v. Christhill*, 69 Md. 219, 14 Atl. 518, "consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. In brief, it is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured." In order to support this action, it was held in *Docter v. Riedel*, 96 Wis. 158, 65 Am. St. Rep. 40, 71 N. W. 119, that the process must have been used to accomplish some unlawful end, or to compel the party against whom it has issued to do some collateral thing which he could not legally be compelled to do. And the common-law action for abusing legal process was held to be confined to cases of this kind, in *Johnson v. Reed*, 136 Mass. 421.

In *Mayer v. Walter*, 64 Pa. St. 283, the distinction is noted between the malicious use and the malicious abuse of process. Every man has a right to use legal process in the prosecution of his claims in a court of law, no matter what motives of malice may actuate him in doing so. Hence, in the use of legal process no action lies unless the person has acted both maliciously and without probable cause. But in an action for the abuse of process this is not true. Actual malice is unimportant, if the process is willfully used to accomplish the purpose intended: See *Stewart v. Cole*, 46 Ala. 646; for unlawful acts willfully done are malicious as to those injured thereby: *Page v. Cushing*, 38 Me. 523. And it is unnecessary to allege or prove that the process was sued out without probable cause: *Page v. Cushing*, 38 Me. 523; *Juchter v. Boehm etc. Co.*, 67 Ga. 534; *Mayer v. Walter*, 64 Pa. St. 283; *Hazard v. Harding*, 63 How. Pr. 326. Expressions in some of the cases to the effect that there must be a want of probable cause to sustain an action for the abuse of civil process are usually dicta, or the situation does not present a case of abuse of process: See *Emerson v. Cochran*, 111 Pa. St. 619, 4 Atl. 498; *Tucker v. Davis*, 77 N. C. 330. In this last case the court stated in the most unequivocal terms that: "Malice alone will not support an action for the abuse of legal process of arrest. There must be a want of probable cause for suing it out

This is elementary doctrine." If the court here meant what its words import, it is directly in conflict with later decisions of the same court, notably *Lockhart v. Bear*, 117 N. C. 298, 23 S. E. 484. Chief Justice Gibson pointed out clearly the distinction between the two actions in *Herman v. Brookerhoff*, 8 Watts, 240, where he said the gist of the action for malicious prosecution was in the origination of a groundless prosecution, while in an action for the abuse of process, it was not the origination of an action, but the abuse of process consequent upon it.

Neither is it necessary in an action for an abuse of legal process that the action should have been terminated. This is an element to sustain an action for malicious prosecution, but the action under consideration differs from that in this respect as well: *Page v. Cushing*, 38 Me. 523; *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207; *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920.

The essential elements of an action for an abuse of legal process have, perhaps, been no more clearly stated than in *Jeffery v. Robbins*, 73 Ill. App. 353. "There is no little confusion," said Justice Sears, "in the reported cases of actions for malicious prosecution and actions for abuse of process. The cases based upon an abuse of process are comparatively few, and a considerable proportion of those reported and cited as such are found, upon examination, to have been in fact actions for malicious prosecution." After showing that the precise requisites for an action of this character have not been very clearly pointed out, and quoting from a large number of cases, the justice proceeds: "It would seem to be only where the prosecution is perverted, i. e., directed outside of its lawful course to the accomplishment of some object other than fixing the charge upon the accused, that one, acting upon probable and reasonable cause, may yet become liable for so perverting the process as to be guilty of an abuse thereof. And to constitute such improper direction of process, the mere existence of an ulterior motive in doing an act proper in itself would not suffice, but there must be such a use of it as is in itself without the scope of the process and improper, from which motive may perhaps be inferred. It would seem both from authority and reason that to sustain the action these two elements are essential: 1. The existence of an ulterior motive; and 2. An act in the use of process other than such as would be proper in the regular prosecution of the charge. From the latter the former may perhaps be inferred, but the existence of the former could not, in reason, dispense with proof of the latter—for if the act of the prosecutor be in itself regular, the motive, ulterior or otherwise, is immaterial." The authorities unquestionably sustain the doctrine of this Illinois case. The mere existence of a reprehensible or indirect motive is not sufficient to constitute an abuse of process: *King v. Henderson*, [1898] App. Cas. 720. Wil-

fully making use of process, however, to accomplish a purpose not justified by law is an abuse for which an action will lie: *Antcliff v. June*, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019. But where the process has been used for a purpose intended by law, no action lies: *Whitten v. Bennett*, 86 Fed. 405.

Jeffrey v. Robbins, 73 Ill. App. 353, intimates that an ulterior motive may be inferred from the improper use of process. And this is certainly the rule. As was said in *Barrett v. White*, 3 N. H. 210, 14 Am. Dec. 352, the presumption of law is that he who abuses process assumed the exercise of it in the first place for the purpose of abusing it, and the court held that the conduct of the defendants was such as to raise a presumption that they intended from the beginning to use the authority of law as a mere pretense for destroying the plaintiff's property.

In all the cases which sustain an action for an abuse of process, it seems that there must be either an injury to the person or to property. Mere indirect injury to one's business or to one's good name is not sufficient. That the action is limited to such cases was directly decided in *Bartlett v. Christhill*, 69 Md. 219, 14 Atl. 518, the court saying that "all the cases upon this subject depend either upon the arrest of the person or the seizure of his property; and we have been referred to none where this action was sustained for an injury to the plaintiff's business or good name. Any unfounded suit may result in such injury; but it will hardly be seriously contended that where there has been no wrongful deprivation of liberty or no illegal seizure of property, that each unfounded suit is to be treated as such an abuse of the process of the law as will sustain an action against the one who instituted it. At all events, we are not prepared to establish such a doctrine, in the absence of all authority to sanction it, and in view of the vexatious and multiplied litigation to which it would inevitably lead." As the cases subsequently reviewed will show, the action has been upheld only where an injury to the person or to property has resulted from the abuse of process.

b. Civil Process.

1. Execution and Attachment.

A. Generally.—An action will lie for the abuse of civil process. The abuse of a writ of execution or attachment may subject a party or an officer executing it to liability: *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. It is an abuse of process to take property under a writ of execution with the malicious intent of injuring and harassing a person: *Lackey v. Campbell* (Tex.), 54 S. W. 46; *Nix v. Goodhill*, 95 Iowa, 282, 58 Am. St. Rep. 434, 63 N. W. 701. And if property is seized by the wrongful use of process and injured, recovery may be had in the absence of malice or without regard to the motives that actuated the person at whose instance

the process was used: *Phoenix etc. Ins. Co. v. Arbuckle*, 52 Ill. App. 33. It is an abuse of process to break open outer doors for the purpose of executing civil process: *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. Process of courts of justice cannot be used for inquisitorial purposes. It is therefore an abuse of process to take out an invalid writ of attachment, knowing it to be such, and attach property not subject to levy, for the purpose of gaining information or evidence upon which to base a proper writ. The second writ cannot be sustained in that way: *Rosenthal v. Circuit Judge*, 98 Mich. 208, 39 Am. St. Rep. 535, 57 N. W. 112. And an attachment cannot be sued out for the purpose of harassing and oppressing a party: *Waugh v. Dabney*, 12 Tex. Civ. App. 290, 33 S. W. 753. The levying of an execution in violation of an agreement not to issue execution without notice may be an abuse of process for which action will lie: *Sommer v. Wilt*, 4 Serg. & R. 19. So, also, if a mortgage creditor violates his contract with his debtor not to enforce his mortgage within a given time, and subsequently levies on his debtor's property, this is such an abuse of legal process as will sustain an action: *Juchter v. Boehm etc. Co.*, 67 Ga. 534. Suing out an execution for a debt which has already been paid, or for an amount greatly in excess of a debt, will usually sustain an action for malicious prosecution, since there generally exists both the malice and the want of probable cause: See *Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255; *Moody v. Deutsch*, 85 Mo. 237. But this would appear also to be an abuse of legal process: *Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255; for which an action will lie: *Barnett v. Reed*, 51 Pa. St. 190, 88 Am. Dec. 574; *Stiff v. Fisher*, 85 Tex. 556, 22 S. W. 577.

In *Shorland v. Govett*, 5 Barn. & C. 485, it was held that an action of trespass would not lie for extorting money under civil process, since extortion was not trespass. We shall subsequently see that a person may be liable for the extortion of money under criminal process, upon the ground of an abuse of process. And we see no reason why the same rule would not apply in the case of civil process, if the proper action were brought. It may be true that no trespass was committed and that, therefore, no action of trespass would lie. But there seems no reason why an action on the case would not lie if the elements constituting an abuse of process were present. A case of extortion arose in *Antcliff v. June*, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019, the court holding that obtaining a judgment by fraud and perjury, not based upon any valid demand, and suing out execution upon such judgment knowing it to be false and fraudulent, and extorting moneys under such execution, is an abuse of process for which an action will lie. The court said this was as clearly an abuse of process as entering up a judgment and suing out execution after the demand is satisfied. It is an abuse of process for which trespass will lie to levy

upon the personal effects of an administrator, after entering under process against the goods of an intestate: *Hazard v. Israel*, 1 Binn. 240, 2 Am. Dec. 428. It is a wrong for which liability will attach, to levy upon and sell the whole property of several cotenants by an execution against only one of them: *Spalding v. Allred* (Utah, Apr. 16, 1901), 64 Pac. 1100.

The mere attachment of property for a debt not yet due is not in itself an abuse of process: *Humphreys v. Sutcliffe*, 192 Pa. St. 336, 73 Am. St. Rep. 819, 43 Atl. 954. It is no abuse of process for a creditor to enter judgment and levy execution upon the property of a solvent debtor: *Docter v. Riedel*, 96 Wis. 158, 65 Am. St. Rep. 40, 71 N. W. 119. The circumstances in this case were extreme and yet the court (Justice Marshall dissenting) held that it was no abuse of process for a creditor, knowing that his debtor was able and would pay a judgment note on demand, without making such demand, to enter judgment on the note at 10 o'clock at night and immediately issue execution and levy it by forcibly breaking into the debtor's store, with intent to injure his business and credit. The case appears to be a close one for the proceedings were unnecessarily harsh and oppressive, and the defendant certainly acted with a malicious intent. In *Mathews v. Baldwin*, 101 Ga. 818, 28 S. E. 1015, it was held not to be a malicious abuse of process for a plaintiff, upon the foreclosure of a chattel mortgage, to cause an execution to be levied upon the mortgaged property, though his belief that he had such right was not well founded, and in *Johnson v. Reed*, 136 Mass. 421, the intentional discontinuance of an action in which property had been attached, and the bringing of a new suit for the same cause of action, and attaching either the same or other property, was not deemed such an abuse of process as would sustain an action.

B. Injury to or Misuse of Property.—Any misuse or injury of property attached is an abuse of process and a trespass to the property. Hence, a bailee who has charge of attached property has no right to use it for his own benefit, as where a horse taken under attachment is cruelly worked: *Briggs v. Gleason*, 29 Vt. 78. An officer who unnecessarily or wantonly removes hay which has been attached is liable as a trespasser for an abuse of process: *Barrett v. White*, 3 N. H. 210, 14 Am. Dec. 852. And one who, with authority to remove a building, sells it after its removal is liable for his abuse of authority: *Mussey v. Cummings*, 34 Me. 74. Creditors who use legal process as a mere cover to get property in their possession in order to put it to their own use are liable therefor: *Eaton v. Cooper*, 29 Vt. 444. But where upon the attachment of a horse and wagon of a debtor they are used to haul away other personal property attached, this is not an abuse of process: *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75. An officer has no authority to break an outer door for the purpose of executing civil process, and

if he does so to seize property, he is liable for an abuse of process. And if he injures any property taken he is liable therefor: *Snyder v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. It is an abuse of process to injure or destroy any property seized under a lawful writ: *Murray v. Mace*, 41 Neb. 60, 43 Am. St. Rep. 664, 59 N. W. 387.

C. Exempt Property.—The seizure and retention of exempt property, known to be exempt, and after its character has been legally established, constitute an abuse of process for which liability will attach: *Castile v. Ford*, 53 Neb. 507, 73 N. W. 945. See, also, *Coleman v. Ryan*, 58 Ga. 132. Hence, an officer who seizes property on execution is liable if he refuses to allow the owner to retain that part of the property which is exempt: *Stephens v. Lawson*, 7 Blackf. 275; *Kiff v. Old Colony etc. Ry. Co.*, 117 Mass. 591, 19 Am. Rep. 429; *Freeman v. Smith*, 30 Pa. St. 264; *Wilson v. McElroy*, 32 Pa. St. 82; *Van Dresor v. King*, 34 Pa. St. 201, 75 Am. Dec. 643. It is a malicious abuse of legal process for a creditor to direct a sheriff to serve an execution by garnishment for a debt due for personal earnings which are exempt from execution, where the purpose is to coerce the debtor into payment to avoid discharge by his annoyed employer: *Nix v. Goodhill*, 95 Iowa, 282, 58 Am. St. Rep. 434, 63 N. W. 701. It is an abuse of legal process for a creditor to initiate a series of garnishments, and tie up in the hands of an employer separate amounts of money which have been earned by his debtor as wages and which are exempt from execution, and then by a subsequent proceeding in garnishment appropriate these amounts to the payment of his debt: *Rustad v. Bishop*, 80 Minn. 497, 81 Am. St. Rep. 282, 83 N. W. 449. In this case the purpose of the successive garnishments was to prevent their payment to the laborer and evade a statute which prevented wages from being thus tied up, until the statutory period of thirty days had expired, and the court held that legal process could not be manipulated in this way to avoid a beneficent exemption statute. Even in the absence of an exemption statute, it appears to be an abuse of process to attempt, by successive attachments, to secure a sufficient amount in the hands of a garnishee to pay a claim in full, and then, without entering the writs used, to commence another suit by attaching the entire fund accumulated: *McNally v. Wilkinson*, 20 R. I. 315, 38 Atl. 1053. In rendering its decision, the court said that "while it was perfectly proper for the plaintiff to attach a sufficient amount to satisfy his claim on the first writ, either by successive attachments thereon, within the time allowed for the service and before the return day thereof, or by a writ of mesne process issued after the entry thereof in court, yet it was an abuse of legal process to go as far as he could on the first writ and then, without entering that, to sue out another for the same cause of action, and attach the same or an additional amount to

satisfy his claim. . . . If the plaintiff could abandon his first suit in this way and commence a second, he could also abandon a second, a fourth, and so on indefinitely, to the great annoyance and vexation of the defendant and also of the garnishee. To use the process of the court to thus tie up money in the hands of a garnishee until the amount shall become large enough to satisfy the plaintiff's claim, and then, without entering the writ or writs employed for this purpose, to commence a fresh suit by attaching the fund thus accumulated, not only works a wrong upon the defendant, but is a perversion of civil process, and cannot therefore be sanctioned. The principle that even a valid and lawful act cannot be accomplished by unlawful means, and that wherever such means are resorted to the law will interpose to restore the party injured thereby to his rights, is a salutary and well-established doctrine of the law."

2. **Distress Warrant.**—An excessive levy under a distress warrant is an abuse of process for which an action will lie: *McKee v. Sims* (Tex.), 45 S. W. 37. And a landlord who distrains for more rent than is due is liable without proof of malice or want of probable cause: *McElroy v. Dice*, 17 Pa. St. 163. If a distress warrant is executed in the night-time, it constitutes such an abuse of process as to make one guilty of trespass: *Sherman v. Dutch*, 16 Ill. 283.

3. **Summons and Subpoena.**—The willful and reckless procuring of a false return to a summons for the purpose of procuring an attachment will render both a creditor and the officer making the false return liable: *Hunter v. Robeson etc. Co.*, 95 Tenn. 124, 31 S. W. 1010. One cannot by fraud induce another to go into another state for the purpose of securing service of process on him. Such service, if made, is void, and confers no jurisdiction on the court to render judgment: *Wood v. Wood*, 78 Ky. 624; *Duringer v. Moschino*, 93 Ind. 495. Judge Cooley in speaking of such a situation where one had been by a subpoena brought within reach of process and it is served upon him, said that possibly no suit would lie for such action, but that the court would see that no benefit was derived from it: *Cooley on Torts*, 190. And this in some cases may afford ample protection to the party improperly served. Yet in *Wauzer v. Bright*, 52 Ill. 35, it was held that where a party had been fraudulently induced to come within the jurisdiction of a court so as to render him or his property amenable to its process, an action would lie therefor.

Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207, is an interesting case on the abuse of a subpoena. A number of small claims against the plaintiff were assigned to another living at some distance from the plaintiff, where suit was brought on the claims. The plaintiff was subpoenaed as a witness and not appearing an attachment was issued against him. The purpose of all this and

especially of issuing the subpoena was not to secure the plaintiff's attendance as a witness, but for the purpose of coercing payment of the claim, the idea being, since the claim was small, that rather than submit to the discomfort, inconvenience and expense of attending court at so great a distance, he would pay the claim. The court in sustaining the action said: "Proceedings that are authorized by law may be made use of for an improper purpose, and acts which separately are legal may be so combined together for an illegal purpose as to constitute a single act that is obnoxious to the law. . . . A subpoena is for the purpose of compelling the attendance of a person whom it is desired to use as a witness; its use for any other purpose is a perversion and abuse of the process of the court; and it seems to me that, within the principle and cases I have referred to the action is well brought; and if there is no precedent for it in this state, the facts in this case demonstrate that it is time that one was made."

4. **Writs of Replevin and Possession.**—It is an abuse of legal process to break open the outer doors of a house and enter to serve a writ of replevin. An officer who does so is a trespasser: *Kelley v. Schuyler*, 20 R. I. 432, 78 Am. St. Rep. 887, 39 Atl. 893. The principal case furnishes a good example of the abuse of process in the execution of a writ of removal. See, also, *McLaughry v. Porter*, 86 Hun, 316, 33 N. Y. Supp. 464, where the suit was brought to recover for personal injuries received in the execution of a warrant of dispossession.

5. **Foreclosure and Sale.**—In *Fears v. State*, 102 Ga. 274, 29 S. E. 463, is to be found a unique abuse of the process of the court in the foreclosure and sale of a stock of liquors. Two parties colluded with each other for the purpose of evading a statute prohibiting the sale of liquor in a certain locality, by entering into an agreement by which one of them, just before his license expired, added a large quantity of liquors to his stock, and executed to the other a mortgage thereon, and allowed a foreclosure of such mortgage and the issuance of an execution, and under the guise of a sale under execution proceeded to sell the liquors in small quantities and at retail from day to day. The court rightly held this to be an abuse of process, the purpose not being to conduct a foreclosure sale for the purpose of raising the amount due on the execution, but to continue the liquor business in violation of law.

c. Criminal Process.

1. **Cases of Arrest.**—The process of arrest has been frequently employed to accomplish an ulterior purpose, and when it is used to effect an object not within the scope of the process, it constitutes an abuse of process for which an action will lie: *Grainger v. Hill*, 4 Bing. N. C. 212. Where there is both the malicious motive and a want of probable cause, the proper action is for malicious prosecu-

tion: See *Krug v. Ward*, 77 Ill. 603; *Whitten v. Bennett*, 86 Fed. 405. An action for the abuse of a process of arrest, usually presupposes that the arrest under the process was proper in its inception, and is founded on grievances arising in consequence of subsequent proceedings: *Whitten v. Bennett*, 86 Fed. 405; *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567. Hence one may be liable for making an arrest in an unauthorized manner: *Read v. Case*, 4 Conn. 166, 10 Am. Dec. 110. The arresting of an engineer when he was preparing his engine to take out a train, at so late an hour at night that it was impossible to secure bail, when the arrest might have been made at any time during the day, and confining him during a very cold night with persons charged with felony, in a filthy and vermin infested cell, with insufficient bedding, was sufficient evidence to show an abuse of process: *Smith v. Weeks*, 60 Wis. 94, 18 N. W. 778. After arrest to subject a person to insults and indignities, to treat with cruelty, deprive of food, or to otherwise treat with oppression and undue hardship is an abuse of process: *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567. The arrest of one who may claim the privilege from arrest is not such an abuse of process as will entitle him to sue for damages. His remedy consists in an application for a discharge from arrest: *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598. A person cannot be arrested and taken to another county for the purpose of subjecting him to civil process there. No jurisdiction is thereby acquired: *Byler v. Jones*, 79 Mo. 261; *Byler v. Jones*, 22 Mo. App. 623.

2. **Criminal Process to Collect Debt.**—The most frequent form that the abuse of criminal process takes is "by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some act, in accordance with the wishes of those who have control of the prosecution": *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567. The leading case seems to be *Grainger v. Hill*, 4 Bing. N. C. 212, where the owner of a vessel was arrested on civil process, and the process was used to compel him to give up his ship's register, to which the plaintiffs had no right, and he was held entitled to recover. In *Shaw v. Spooner*, 9 N. H. 197, 32 Am. Dec. 348, it was said to be wholly illegal to use the criminal process of the state to extort money, or even to compel the payment of debts. In this case creditors in Massachusetts obtained a requisition from the governor of that state and an order from the governor of New Hampshire for the arrest and delivery of a debtor residing in the latter state. The debtor was held until he paid part of the debts, secured the rest by his own notes and paid the expenses of procuring the arrest. Money extorted by means of criminal process was allowed to be recovered in *Richardson v. Duncan*, 8 N. H. 508, and Sever-

ance v. Kimball, 8 N. H. 386. It is duress to abuse process against the person to compel one to do an act against his will, and the act done may be avoided: Breck v. Blanchard, 22 N. H. 303. An action for the abuse of legal process was sustained in Hazard v. Harding, 63 How. Pr. 326, where the plaintiff had been arrested and imprisoned for a fictitious claim. In Sneed v. Harris, 109 N. C. 349, 13 S. E. 920, the purpose of the defendants in having the plaintiff arrested was to get possession of the land he was occupying by having him removed from it by the sheriff so they could enter upon it, and this was held an abuse of process. The arrest of a debtor to compel the payment of a debt out of property exempt from execution is an abuse of legal process which will render the creditor liable: Lockhart v. Bear, 117 N. C. 298, 23 S. E. 484. Causing an arrest under a writ of execution upon a judgment for the entire amount of the judgment when a portion had already been paid, and when he was willing to pay what remained unpaid, is such abuse of process as will sustain a right of action: Jennings v. Florence, 2 Com. B., N. S., 467. Maliciously causing an arrest for a much larger amount than is due will also sustain an action: Austin v. Debnam, 3 Barn. & C. 139.

There may be cases, however, where one may make use of criminal process and at the same time have some ulterior motive in the way of securing his property stolen or payment therefor. Thus in Jeffrey v. Robbins, 73 Ill. App. 353, it was held that the procuring of an indictment upon probable cause, even though for the purpose of compelling a person to relinquish certain claims to real estate, and employing counsel to assist in the prosecution, was not actionable. The court aptly observes: "If one whose goods have been stolen shall prosecute the thief, and secure his conviction, although his motive may have been ulterior in that he hoped thereby to secure a return of his goods, and although the goods may, in the course of the prosecution, be returned to him, yet it is difficult to perceive how he could be held liable, merely because of such motive, either for a malicious prosecution or for an abuse of process, if he has acted upon probable cause, and if the entire prosecution has been conducted by lawful methods and within the prescribed lines of procedure. Abuse implies irregular and improper use, not merely regular and proper use with a bad motive."

II. Liability for Abuse of Process.

a. **Who is Liable.**—An officer who improperly seizes property, or who wantonly removes it or injures it after seizure is liable therefor: Hazard v. Israel, 1 Binn. 240, 2 Am. Dec. 438; Barrett v. White, 8 N. H. 210, 14 Am. Dec. 352; Sherman v. Dutch, 16 Ill. 283; Kelley v. Schuyler, 20 R. I. 432, 78 Am. St. Rep. 887, 39 Atl. 893. So is he liable if he seizes and sells the property of one not named in the writ: Spalding v. Allred (Utah, Apr. 16, 1901), 64 Pac. 1100. An

officer is liable for using legal process as a cover for illegal acts: *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993. To render the officer liable as a trespasser his act must be in the nature of a trespass: *Ferrin v. Symonds*, 11 N. H. 363. There must be such gross misconduct as to furnish an indication that the officer intended at the outset to use his process as a cover for wrongdoing: *Taylor v. Jones*, 42 N. H. 25; *Gordon v. Clifford*, 28 N. H. 402.

A justice of the peace who renders a judgment knowing it to be void because of his relation to one of the parties to the action may be liable to the injured party: *McVea v. Walker*, 11 Tex. Civ. App. 46, 31 S. W. 839. A magistrate may become a trespasser by knowingly acting beyond his jurisdiction and attempting to enforce any process founded on a judgment entered in such a case: *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438.

A party to an action who employs an officer to execute lawful process is not liable for an abuse of process by such officer unless he ordered or encouraged it: *Sutherland v. Ingalls*, 63 Mich. 620, 6 Am. St. Rep. 332, 30 N. W. 342; *People's etc. Assn. v. McElroy*, 79 Ill. App. 266; *Adams v. Freeman*, 9 Johns. 117. The party must in some way participate in the unlawful act of the officer: *Wells, Fargo & Co. v. Waites* (Tex. Civ. Ap., Dec. 22, 1900), 60 S. W. 582; *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993. A party may also subject himself to liability for an officer's abuse of process by subsequently ratifying the acts: *Teel v. Miles*, 51 Neb. 542, 71 N. W. 296. But the ratification should be clear: *Adams v. Freeman*, 9 Johns. 117. And be made with full knowledge of the officer's acts: *People's etc. Assn. v. McElroy*, 79 Ill. App. 266.

As indicated by the principal case, where process is employed by a party to an action to accomplish some ulterior object, or is oppressively and unlawfully used by him or by an officer under his direction, naturally he is to be held liable for such abuse. Thus the use of process to extort money will subject a party to liability: See *Hazard v. Harding*, 63 How. Pr. 326; *Sneeden v. Harris*, 109 N. C. 349, 18 S. E. 920; *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386. Creditors who abuse the process of arrest for the purpose of compelling their debtor to pay a debt out of property exempt from execution are liable therefor: *Lockhart v. Bear*, 117 N. C. 298, 23 S. E. 484.

Even an attorney may be held liable for an abuse of process, where the acts complained of are his own personal acts, or the acts of others wholly instigated and carried on by him: *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207.

b. Remedies.

1. In General.—An abuse of process may be such an abuse or actual invasion of property rights or such an injury to the person

as to render an officer, or one under whose direction the officer acts, a trespasser *ab initio*, and liable to an action of trespass: *Barrett v. White*, 3 N. H. 210, 14 Am. Dec. 352. Thus levying on the personal effects of an administrator after entering under a process against the goods of the intestate is a trespass: *Hazard v. Israel*, 1 Binn. 240, 2 Am. Dec. 438. So, also, in the use of attached property by a bailee for his own benefit: *Briggs v. Gleason*, 29 Vt. 78. See, also, *Nash v. Mosher*, 19 Wend. 431; *Mussey v. Cahoon*, 34 Me. 74. And see the cases cited in the note in 14 Am. Dec. 365. A distress warrant executed in the night-time is a trespass: *Sherman v. Dutch*, 16 Ill. 283. So is the breaking and entering of the outer doors of a dwelling-house for the purpose of serving an ordinary writ of replevin or other civil process: *Kelley v. Schuyler*, 20 R. I. 432, 78 Am. St. Rep. 887, 39 Atl. 893; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. An officer who seizes and sells the property of one not named in the writ may be liable either for a trespass or for conversion at the election of the one injured: *Spalding v. Allred* (Utah, April 16, 1901), 64 Pac. 1100. Selling goods exempt from execution in disregard of the parties' claim for the benefit of the exemption law is a wrong for which either trespass or case will lie: *Van Dresor v. King*, 34 Pa. St. 201, 75 Am. Dec. 643. In *Jimison v. Reifsneider*, 97 Pa. St. 136, where there had been an excessive distress, the proper remedy was held to be by an action on the case and not replevin for the goods distrained. In *Shoreland v. Govett*, 5 Barn. & C. 485, it was held that trespass would not lie for extorting money under civil process, for extortion is not trespass. But, as previously intimated, there seems no reason why an action on the case would not be appropriate. Indeed, this action was framed to provide for the manifold situations where trespass was not appropriate. And certainly under our reformed procedure an action on the case is proper and will lie for an extortion under civil process, whatever the pleader may call his action: *Antcliff v. June*, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019. An action on the case would seem to be the appropriate remedy in an ordinary case for the abuse of legal process. Under modern procedure the form of the action is immaterial; all that is required is that the facts should be clearly and concisely stated: *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920; *Hazard v. Harding*, 63 How. Pr. 326. Where money has been extorted by the abuse of a process of arrest, the money may be recovered in an action of assumpsit: *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386. And a deed executed under similar circumstances may be avoided: *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170.

In *Rosenthal v. Circuit Judge*, 98 Mich. 208, 39 Am. St. Rep. 535, 57 N. W. 112, where a writ of attachment had been abused by illegally seizing books of account, the party injured was held to be

entitled to an order of court requiring such books to be delivered to the owners and restraining the parties from in any way making use of such books or disclosing their contents.

In *Fears v. State*, 102 Ga. 274, 29 S. E. 463, where the process of execution in a sale under foreclosure was abused for the purpose of continuing the liquor business in violation of a prohibition law, the court was deemed to have power to prevent such illegal sale either by injunction or other proper direction.

2. **Damages.**—If the action is trespass, the plaintiff may recover for the pecuniary loss sustained as a natural and legal consequence of the trespass, and also any special or peculiar damages which he has suffered, if such special damages are pleaded: *Sherman v. Dutch*, 16 Ill. 283. In *Phoenix etc. Ins. Co. v. Arbuckle*, 52 Ill. App. 33, it was said that the payment of legal costs was the measure of the liability in cases of an abuse of legal process, unless there existed malice or want of probable cause. But this statement was made in a case where the plaintiff in good faith believed he had a valid cause of action. This certainly is not true where process is used for some unlawful purpose not intended by law. A party may certainly recover whatever actual damage he has suffered by reason of the abuse of process: See *Juchter v. Boehm etc. Co.*, 67 Ga. 534; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551; *Murray v. Mace*, 41 Neb. 60, 43 Am. St. Rep. 664, 50 N. W. 387; *Teel v. Miles*, 51 Neb. 542, 71 N. W. 296; *Barnett v. Reed*, 51 Pa. St. 190, 83 Am. Dec. 574; *McKee v. Sims (Tex.)*, 45 S. W. 37; *Hunter v. Robeson etc. Co.*, 95 Tenn. 124, 31 S. W. 1010. Where by the abuse of process, one's business has been injured or destroyed, prospective profits as such are not recoverable, yet damage to business, and loss of profits which a tradesman was making when his goods were seized, may be considered in estimating the damages sustained: *Juchter v. Boehm etc. Co.*, 67 Ga. 534. If one has no ground for resorting to an extreme remedy, the injured party may have liberal though not vindictive damages: *Stetson v. Le Blanc*, 6 La. 266.

Where the abuse of process is accompanied by actual malice, vindictive or punitive damages may be awarded as a punishment: *Barrett v. Reed*, 51 Pa. St. 190, 83 Am. Dec. 574; *Juchter v. Boehm etc. Co.*, 67 Ga. 534; *Wanzer v. Bright*, 52 Ill. 35; *Coleman v. Ryan*, 58 Ga. 132; *Sherman v. Dutch*, 16 Ill. 283; *People etc. Assn. v. McElroy*, 79 Ill. App. 266. And the same rule applies to officers as to private persons: *Nightingale v. Scannell*, 18 Cal. 315; *Rodgers v. Ferguson*, 36 Tex. 544. Hence, a justice of the peace who renders a judgment knowing it to be void by reason of his relation to one of the parties, the injured party may have such vindictive damages as the circumstances may justify: *McVea v. Walker*, 11 Tex. Civ. App. 46, 31 S. W. 839. If one seeks, under color of process, to wreak his vengeance on an individual and his family, by harassing and

insulting them, vindictive damages are proper: *Louder v. Hinson*, 4 Jones, 369. Exemplary damages may be allowed for any wrongful use of process for the purpose of harassing or oppressing a party: See *Waugh v. Dabney*, 12 Tex. Civ. App. 290, 33 S. W. 753. Where property exempt from execution is seized for the purpose of breaking up the plaintiff's business, vindictive damages may be allowed: *Coleman v. Ryan*, 58 Ga. 132. Vindictive damages may be recovered though the oppression and malice used was not intended for the plaintiff, but for another: *McBride v. McLaughlin*, 5 Watts, 375. Where the unlawful act is inspired by malice, compensation for mental suffering of the injured party is a legitimate element of damage: *Murray v. Mace*, 41 Neb. 60, 43 Am. St. Rep. 664, 59 N. W. 887.

SHAWYER v. CHAMBERLAIN.

[113 Iowa, 742, 84 N. W. 661.]

EVIDENCE.—A CONVERSATION OVER A TELEPHONE is admissible in evidence, and the fact that its character is uncertain and easily manufactured merely affects the weight it should receive. (p. 411.)

EVIDENCE—INVOICE—COST PRICE.—The fact that a witness testifies as to an invoice of the cost price of goods will not preclude him from giving independent testimony of the wholesale cost. (p. 411.)

A DEFENSE THAT A CONTRACT IS VOID OR VOIDABLE must be specially pleaded. (p. 411.)

THE AMENDMENT OF PLEADINGS TO CONFORM TO THE FACTS PROVEN is authorized only when it does not substantially change the defense. (p. 412.)

McGrath & Bryan, for the appellant.

Filkins & Schaeffler and Nagle & Nagle, for the appellee.

⁷⁴³ LADD, J. The defendant insists that the testimony of plaintiff to a conversation with him through the telephone ought to have been excluded, for that it is of too uncertain and easily manufactured a character to be competent. These defects, if they exist, would not justify rejecting such evidence, but merely affect the weight ⁷⁴⁴ it should receive. This method of communication, of recent origin, is one of the incidents of contemporary history, of which the courts take judicial notice. It greatly facilitates business transactions, and there is no better reason for rejecting proof of a conversation over a telephone line than of one had without its use.

Identity may be established by means of the hearing or other circumstances quite as readily, though possibly not as certainly, as by sight: *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49; *Oskamp v. Gadsen*, 35 Neb. 7, 37 Am. St. Rep. 428, 52 N. W. 718; *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901. See *German Sav. Bank of Davenport v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769; *Davis v. Walter*, 70 Iowa, 465, 30 N. W. 804.

2. An invoice of the cost price of the goods was introduced in evidence, and Lowry, the maker of it, was allowed to orally testify to the wholesale cost thereof. The mere fact that a memorandum was made did not preclude other evidence on the same subject: See *Christman v. Pearson*, 100 Iowa, 634, 69 N. W. 1055; *Green Bay Lumber Co. v. Thomas*, 106 Iowa, 420, 76 N. W. 651. If the witness had knowledge independent of the invoice, it might be elicited; and, if he was making use of the figures in the book, his evidence was without prejudice.

3. The record discloses that the stock included intoxicating liquors valued at one hundred and sixty-four dollars and thirty-four cents. The defendant urges that because of this the contract was void, under section 2423 of the code: See *Lindt v. Uihlein*, 109 Iowa, 591, 79 N. W. 73. "But any defense, showing that a contract, written or oral, . . . is void or voidable . . . must be specially pleaded": Code, sec. 3629; *Reich v. Bolch*, 68 Iowa, 526, 27 N. W. 507; *Glidden v. Higbee*, 31 Iowa, 379. No such issue was presented by the answer until the verdict had been returned; nor does the record show the trial to have proceeded on that theory. The evidence of intoxicating liquors came out in proving the cost price of the stock, as bearing on the measure of damages; and the court, in overruling the motion to direct verdict at close of plaintiff's⁷⁴⁵ evidence, distinctly rejected the attempt to inject that issue when not properly plead. In the instruction submitting the interrogatory as to whether liquors were included in the stock, the jury was told not to allow that fact any influence in determining the case. Calling for an answer thereto, in these circumstances, cannot be construed as treating the matter of inquiry as an issue in the trial.

4. Two days after the verdict was returned, the defendant filed an amendment to his answer, setting up the alleged invalidity of the contract, and on motion this was stricken from the files. Section 3600 of the code authorizes amendments conforming the pleadings to the facts proven only when this

does not change substantially the defense: *Wheeler v. City of Boone*, 108 Iowa, 235, 78 N. W. 909; *Denzler v. Rieckhoff*, 97 Iowa, 75, 66 N. W. 147; *Gallaher v. Head*, 108 Iowa, 588, 79 N. W. 387; *Thoman v. Chicago etc. Ry. Co.*, 92 Iowa, 196, 60 N. W. 612. As defendant might not reasonably have anticipated such liquors formed a part of the stock, doubtless he would have been permitted to amend his answer had application been made as soon as this fact appeared. But, as it raised an entirely new issue, the court did not abuse its discretion in striking it when filed after verdict.

The contract was sufficiently definite, and the eighth instruction was not open to the criticism made.

Affirmed.

Conversations by Telephone, if pertinent, are admissible in evidence: *Missouri Pac. Ry. Co. v. Heldenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608; *Lord Electric Co. v. Morrill*, 178 Mass. 304, 59 N. E. 807; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49. See also, the extended note to *Central Union Tel. Co. v. Falley*, 10 Am. St. Rep. 135, 136; *Oskamp v. Gadsden*, 35 Neb. 7, 37 Am. St. Rep. 428, 52 N. W. 718; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769.

The Amendment of Pleadings changing the cause of action is discussed in the monographic notes to *Flanders v. Cobb*, 51 Am. St. Rep. 414-435; *Stevenson v. Mudgett*, 34 Am. Dec. 158-162. The only limitation on the power of courts to allow amendments under the code system of pleading is, that no vested right shall be disturbed and that the cause of action shall not be changed substantially: *State v. Mitchell*, 102 N. C. 347, 11 Am. St. Rep. 748, 9 S. E. 702; *Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

GAMBRILL v. SCHOOLEY.

[93 Md. 48, 48 Atl. 730.]

LIBEL—PUBLICATION.—The writing and sending of a letter containing libelous matter, not read nor exhibited to any person other than the one libeled, is not the publication of the libel. (p. 414.)

LIBEL—PUBLICATION BY DICTATION.—The dictation of a libelous letter to a confidential shorthand writer and the copying of it by him on a typewriting machine, after which it is signed by the person dictating it, is a publication of its contents, so as to entitle the person to whom it is addressed to maintain either libel or slander upon it, although there is no communication of its contents to any other person. (p. 420.)

LIBEL—DAMAGES.—If the words charged in an action for slander or libel are actionable per se, the question of damages, whether exemplary or otherwise, is exclusively within the sound discretion of the jury. (p. 420.)

LIBEL—DAMAGES—MALICE—DISCRETION OF JURY.—If the defendant, in an action for libel, honestly and in good faith believed the statements contained in the letters alleged to be libelous to be true, and had grounds for such belief sufficient to satisfy an ordinarily prudent man, the jury may take into consideration all the circumstances of the case, and, in the exercise of their discretion, award nominal damages merely. (p. 420.)

LIBEL—DAMAGES—DISCRETION OF JURY.—If in an action for libel there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury, but it is error to instruct the jury in such case that exemplary damages must be given. (p. 420.)

G. Whitelock, J. P. Poe, and E. T. Jones, for the appellant.

W. Colton, H. C. Gaither, and A. R. Hagner, for the appellee.

58 PEARCE, J. This is an action of libel in which the appellee recovered a judgment for five hundred dollars against

the appellant in the superior court of Baltimore City. The plaintiff offered five prayers, all of which were granted, and the defendant offered fifteen prayers, of which the fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, and fourteenth, were granted and his first, second, third, ninth, and fifteenth were rejected. A single exception was taken by the defendant to this ruling on the prayers, and the three following questions arise upon the exception: 1. Whether the dictation of alleged libelous letters to defendant's private and confidential stenographer, their reduction by her to stenographic characters, and subsequent reduction to the characters of the alphabet by means of a typewriter, their signing by the defendant, and their transmission by his direction to the plaintiff, is in law a publication of such letters, where there is no communication of any of said letters in any manner to any other person; 2. Whether in such case, the proper action is for libel or slander; 3. Whether under the testimony in this case, the jury was properly instructed as to the allowance of exemplary or vindictive damages.

There were three counts in the declaration upon three separate letters, and the case was tried on the general issue plea, there being no plea of justification alleging the truth of any of the charges contained in any of the letters, either in whole or in part.

Of the libelous character of each of these letters there can be no question, but the letter in the third count was shown by the uncontradicted testimony to be wholly in the handwriting of defendant and never to have been read or exhibited to anyone ⁵⁹ but the plaintiff, and the jury was properly instructed by the defendant's fourth prayer that there could be no recovery on the third count.

It was very earnestly and ably argued by the appellant's counsel that as the two letters in the first and second counts were not otherwise published than as above stated, there was no actionable publication of either letter, so as to make either one a libel, and consequently, that the court erred in granting the plaintiff's third and one-half and fourth and one-half prayers, and in rejecting the defendant's first, second, and third prayers, which, respectively, raised the contentions of the parties on this point.

This is certainly an important question, and one which has never before been raised in this court. Indeed, the appellant's counsel states in his brief that it has never been expressly

ruled upon in America, though he has referred us to a case in the appellate division of the supreme court of New York (*Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033), which he contends supports his positions. The appellee's counsel has submitted a very full brief, but has referred us to no American case upon this point. If such authorities existed, we may safely assume they would not have escaped the well-known diligence of counsel, and we have found none such in our own examination; but the principles and considerations upon which this question should be decided are not, in our opinion, difficult to determine, and the instructive English cases which have been cited are in accord with these principles and considerations.

Before considering the argument of the appellant, it will be well to recall the definition of publication, given by competent authority, as necessary to constitute slander a libel. Mr. Odgers, in his work on *Libel and Slander*, page 150, defines publication as applicable either to slander or libel, as, "the communication of the defamatory words to some third person"; and on page 1 he says: "False defamatory words, if written and published, constitute a libel; if spoken, a slander." It is obvious, however, that publication is essential to either, and that the words, "if published," though not repeated in the latter ⁶⁰ clause, must be understood as if repeated. For, to shout aloud defamatory words on a desert moor where no one hears them, is not a publication of the slander, nor is the utterance of such words in a foreign language a publication, if no one present understands their meaning: Odgers on *Libel and Slander*, 151.

For the same reason, very clearly, if one should write a defamatory letter, and hand it to a third person to be read, who does not understand and cannot read that language, there would be no publication of the libel. In *Pullman v. Hill* (1891), 1 Q. B. D. 529, Lopes, L. J., defines publication of a libel in the exact words cited from Mr. Odgers, and in the same case, Lord Esher, master of the rolls, defines it more fully, and perhaps with more technical accuracy, as, "the making known the defamatory matter, after it has been written, to some person other than the person to whom it is written." Appellant's counsel in his brief says, with equal clearness and accuracy: "Publication, in the law of libel and slander, means the transmission of ideas and thoughts to the perception of a person other than the parties to the suit."

Bearing in mind these definitions and simple illustrations of what is and what is not publication, it will be seen that the argument that there has been no actionable publication in this case divides itself into two branches. The theory of the first branch is, that while there was in fact a physical or mechanical reception by the stenographer of the thoughts expressed by the appellant, that such reception was instantaneous only, and merely sufficient for their reduction to written characters; but that there was no comprehension and no lodgment of their meaning in the brain of the recipient, who acted as a mere phonograph, and whose function in that regard was not a mental, but purely a mechanical process; so that there was no such perception as is requisite to constitute publication. This theory is both ingenious and subtle, but we cannot be persuaded it is sound. We cannot doubt that the dictation to Miss Willis, though taken down in stenographic characters, produced in her mind as full and complete perception of the thoughts of the appellant as a slower dictation, for the purpose ⁸¹ of reduction to ordinary characters, would have produced in the mind of one not a stenographer. If this were not so, there could be no assurance that there would be an accurate reproduction of the matter dictated, such as common knowledge gives assurance of from any skillful stenographer. A communication, therefore, to a stenographer must be regarded precisely as a communication to an ordinary amanuensis, and as establishing all that is ordinarily necessary to constitute publication.

The second branch of the argument is, that in view of the fact that Miss Willis was the private and confidential stenographer of the defendant, and in view of the almost universal employment in this country of such stenographers, and the necessity for such employment consequent upon the demands of business, that a communication to such a stenographer should be made an exception to the general rule, and be held not to be an actionable publication. But we cannot adopt this view. Apart from any precedent or authority, we can perceive no good reason why such an exception should be made to the rule. Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal which is illegal, nor make that innocent which would otherwise be actionable. Nor can the fact that the stenographer is under contractual or moral obligation to regard all his employer's communica-

tions as confidential alter the reason of the matter. This defense was made in *Williamson v. Freer*, L. R. 9 Com. P. 393, where it was held that the unnecessary transmission by a post-office telegram of libelous matter, which would have been privileged if sent in a sealed letter, avoids the privilege—Lord Coleridge, C. J., saying: “Although the clerks are prohibited under severe penalties from disclosing the contents of telegrams passing through their hands, still there is a disclosure to them.”

In *Pullman v. Hill* (1891), 1 Q. B. D. 529, already cited, the exact question here presented was decided. There, the letter containing the defamatory matter was dictated by the managing director of a corporation to a clerk, who took down the words in shorthand, ⁶² and then wrote them out fully by means of a typewriting machine, and the letter thus written was copied by an office boy in a letter-press book. When it reached its destination it was in the ordinary course of business opened by a clerk of the plaintiff; and it was held that the letter must be taken to have been published both to the typewriter and to the copy-press boy, as well to the plaintiff's clerk. Lord Esher, M. R., in the course of his opinion said: “I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself.” Lopes, L. J., said: “It is said business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter, he must write it himself and copy it himself, or he must take the consequences.” Kay, L. J., said: “The consequence of such an alteration in the law of libel would be this, that any merchant or solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent.”

We were referred to *Boxsius v. Goblet Freres* (1894), 1 Q. B. D. 843, as evincing a disposition to qualify the rule in *Pullman v. Hill* (1891), 1 Q. B. D. 529, but we cannot discover such

disposition, and if we could, we should not be inclined to follow it. There, the libelous letter was dictated by a solicitor, acting in behalf of and at the direction of his client, and copies were made as in the case mentioned. The court distinguished the case very clearly from *Pullman v. Hill* (1891), 1 Q. B. D. 529, holding, through two of the same judges, that the solicitor owed to his client the duty to act on his instructions, and that if the solicitor had communicated ⁶³ directly with the plaintiff, the communication would have been privileged, and that he could discharge that duty, as he did other business of the office, in the ordinary way without losing the privilege. But there was no question of privilege in *Pullman v. Hill* (1891), 1 Q. B. D. 529, and there is none here, as the appellant owed no duty in the matter to anyone. The typewriter had no conceivable interest in hearing or seeing the letters, and there could be therefore no privilege between her and the appellant.

In *Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033, the alleged libelous letter relating to the business of a corporation, was dictated by its manager to its stenographer, who wrote it out in shorthand, copied it upon a typewriter, and mailed it. The manager and stenographer were held to be servants of a common master, and to be engaged in the performance of duties which their respective employments required, and that, under such circumstances, the stenographer should not be regarded as a third person, in the sense that either the dictation or the subsequent reading should be regarded as a publication by the corporation. The English cases mentioned were not referred to, but the court nevertheless said: "It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter he held not be privileged." Upon the exact question here involved the above extract from the opinion in that case seems to afford slender support to the appellant's contention, and what it does decide is not in accord with the views expressed by this court in *Carter v. Howe Machine Co.*, 51 Md. 294, 34 Am. Rep. 311, in which Judge Alvey said it would seem to be now clear, whatever may have been the former state of judicial opinion upon the subject, that corporations are liable for all acts, whether willful or malicious, of their agents or servants, done in the course of their employment, and that actions for such injuries, including libel, could

be sustained against corporations in any case where, under similar circumstances, such actions could be sustained against individuals for the acts of their servants. It is true that that ⁶⁴ case was not an action for libel, but it sufficiently indicates that this court would not be astute to find reasons for relieving corporations from liability in libel cases, for want of technical publication. We think, for the reasons given above, that the defendant's first prayer was properly rejected.

Apart from the question of publication, the defendant's second and third prayers raise the additional question whether, under the pleadings in this case, the action must not have been for slander, instead of libel, but we have no difficulty on this point. We have no doubt that the dictation of these letters to the stenographer was the publication of a slander, for which if nothing further had been done by either, an action of slander could have been maintained, but we have no more doubt that the stenographic notes, the typewritten copy, and the letter-press copy constituted the publication of a libel, and that either slander or libel could be maintained, as the appellee should elect. This conclusion, we think, necessarily follows from what we have already said, without more formally stating the reasons, and our conclusion is not shaken by Mr. Odgers' criticism of the decision in *Pullman v. Hill* (1891), 1 Q. B. D. 529, upon the form of action, to be found on page 174 of his last edition. We therefore think the defendant's second and third prayers were properly rejected, not only for the reasons now given, but for those applicable to defendant's first prayer, and that the plaintiff's third and one-half and fourth and one-half prayers were for the same reasons properly granted. The plaintiff's first and second prayers were not questioned at the argument, and are so clearly correct as to require no notice.

The plaintiff's fifth prayer was also properly granted for reasons which will appear when we come to consider the defendant's ninth prayer.

The defendant's ninth prayer was properly rejected, because it precluded the jury from including in their verdict any allowance whatever for exemplary or punitive damages. Whenever the words charged in an action for slander or libel are actionable per se, as in this case, the damages are exclusively within the sound discretion of the jury: 13 Am. & Eng. Ency. of Law, 432; *Tripp v. Thomas*, 3 Barn. & C. 427; *Marks v. ⁶⁵ Jacobs*, 76 Ind. 216; *Nolan v. Traber*, 49 Md. 470; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715. Whether exemplary dam-

ages shall be given or not, is in all cases for the jury: *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125; *Boardman v. Goldsmith*, 48 Vt. 403.

The assessment of damages is peculiarly the province of a jury in an action for libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove: *Davis v. Shepstone*, 11 App. Cas. 191, per Lord Herschell. The jury must not be restricted by a direction not to give such damages: *Devaughn v. Heath*, 37 Ala. 595.

The plaintiff's fifth prayer is in accord with these principles, and was therefore properly granted. We cannot, however, avoid the conclusion that there was error in the rejection of the defendant's fifteenth prayer, which asked that the jury be instructed, if the defendant honestly and in good faith believed the statements contained in the letters to be true, and had grounds for such belief sufficient to satisfy an ordinarily prudent and cautious man that such statements were true, then the jury might take into consideration all the circumstances of the case, and, in the exercise of their discretion, award to the plaintiff nominal damages merely.' This prayer is very carefully guarded by the requirement to find honest belief of the truth of the charges, and of reasonable ground for such belief, and in its conclusion is substantially the converse of the proposition contained in the plaintiff's fifth prayer which we have said was properly granted. By the rejection of the defendant's fifteenth prayer, the jury were practically told they must give exemplary damages, and were absolutely refused the discretion to withhold them. But in no case has a plaintiff any legal right to exemplary damages. Such damages depend upon the case and the evidence and finding of the jury: *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125.

Where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury: *Boardman v. Goldsmith*, 48 Vt. 403. And it is error to instruct them they ⁶⁶ must give exemplary damages: *Sedgwick on Damages*, 333; *Hawk v. Ridgway*, 33 Ill. 473.

The words used here being actionable per se, although there was no proof of actual and substantial damages sustained by the publications to Miss Willis of the two letters, the jury could not properly have been deprived of their discretion to give exemplary damages, if they found malice, nor could they,

on the other hand, either by the granting of an erroneous instruction or the rejection of a proper one, be deprived of their discretion to refuse to award exemplary damages if they found no malice.

For the error in the rejection of the defendant's fifteenth prayer it will be necessary to reverse the judgment, that a new trial may be had.

Judgment reversed with costs to appellant above and below, and new trial awarded.

A Libel Published only by writing and mailing it to the plaintiff will not support an action: *Spalts v. Poundstone*, 87 Ind. 522, 44 Am. Rep. 773; *Wilcox v. Moon*, 64 Vt. 450, 33 Am. St. Rep. 936, 24 Atl. 244. It is enough, however, that the contents of the writing should be made known to a single other person, as where a letter is written by a third person at the request of the defendant and the defendant signs it. Especially is this true where he subsequently states, in the presence of witnesses, the contents of the letter: *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455.

The Amount of Damages in an Action for libel is peculiarly with. in the province of the jury: *Tracy v. Hacket*, 19 Ind. App. 133, 65 Am. St. Rep. 398, 49 N. E. 185; *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. Rep. 646, 41 N. E. 409. Belief in the truth of a libel goes only in mitigation of damages and is not a justification: *Fountain v. West*, 23 Iowa, 9, 92 Am. Dec. 405. Nor can such belief be considered in mitigation of damages unless it appears to have been based on information derived from a reliable source: *Edwards v. San Jose Print. Soc.*, 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128. See, too, *Sickra v. Small*, 87 Me. 493, 47 Am. St. Rep. 344, 33 Atl. 9, on the elements of damage in actions for libel. Consult the monographic note to *Terwilliger v. Wands*, 72 Am. Dec. 426-436.

Exemplary Damages are Recoverable in a proper case: *Cotulla v. Kerr*, 74 Tex. 80, 15 Am. St. Rep. 819, 11 S. W. 1058; *Childers v. San Jose etc. Pub. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903. Their allowance and the assessment thereof, in an action for slander, are in the discretion of the jury: *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. Rep. 583, 26 S. W. 1020; *Cahill v. Murphy*, 94 Cal. 29, 28 Am. St. Rep. 88, 30 Pac. 195.

BOARD OF POLICE COMMISSIONERS v. WAGNER.

[93 Md. 182, 48 Atl. 455.]

POLICE POWER—SUMMARY SEIZURE OF GAMBLING IMPLEMENTS—DUE PROCESS OF LAW.—A machine, instrument, or implement, admitted to be incapable of being put to any legitimate use and designed and intended to be used for violating the gambling laws of the state, is an instrument *malum in se*, hurtful in character to the public peace and morals, and as such is subject to summary seizure and detention under the police power of the state. No action will lie for the recovery of such instrument when thus seized and detained, nor is anyone deprived of his property without due process of law by such seizure. (p. 423.)

A. L. Miles, for the appellant.

W. C. Chesnut and Gans & Haman, for the appellee.

¹⁹⁰ PAGE, J. This is an action of replevin to recover a musical slot-machine. The third plea is, that the article is "a gambling device or instrument intended and designed to be used by the plaintiff and others in violation of the gambling laws of the state, which can be put to no legitimate use, and was detained by the defendants, in the discharge of their official duty, to prevent such violation, and to be used, if necessary, as evidence against the plaintiff"; and the replication is, that at the time the machine was taken "there was no charge pending against the plaintiff for any violation of the gambling laws of this or any other state; that the plaintiff was not arrested, nor has since been arrested nor any warrant issued for his arrest on any such charge, nor has any such charge been preferred against him; and that the said machine was not taken and retained by the defendants for use as evidence against any other person." To this replication the defendants demurred, which, being overruled, this appeal was taken. The effect of the demurrer is to admit: 1. That the musical slot-machine is a gambling device "intended and designed to be used by the plaintiff and others in violation of the gambling laws of the state"; 2. That it can be put to no legitimate use; ¹⁹¹ 3. That it is detained by the appellants, in the discharge of their official duty, to prevent such violation of the gambling laws of the state; and 4. That such machine was taken at a time when there was no charge pending against the appellee for a violation of the gambling laws of this or any other state, nor any warrant issued for his arrest, nor any charge preferred against him."

The contentions of the respective parties turn upon the question whether a machine of that character, seized summarily by a police officer, can be recovered in an action of replevin. The appellant contends that inasmuch as it is admitted by the demurrer that it is an instrument incapable of being put to any legitimate use, and was designed to be used by the appellant and others for violating the gambling laws of the state, it is an instrument *malum in se*, hurtful in character to the public peace and morals, and as such is subject to summary seizure and detention under the police power of the state, and therefore the action will not lie.

It is fully sustained by the decisions in this court that the state has power to pass such laws as are necessary to protect the health, morals, or peace of society; and where the summary seizure, or even the destruction, of the offending thing is necessary for the public safety, may authorize that to be done, and such laws are not incompatible with those constitutional limitations which declare that no person shall be deprived of his property "without due process of law": *Deems v. Mayor etc. of Baltimore*, 80 Md. 173, 45 Am. St. Rep. 339, 30 Atl. 648; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273. If, therefore, this principle must be assumed without further question, it is clear that if the police commissioners have been invested by the state with power to make seizures of property for the purpose of preventing crime, such authority can be amply sustained under the police power of the state, and its proper exercise would not be obnoxious to the constitutional provision against seizing property without due process of law. The question here confronting us, therefore, is not a constitutional question, but one which depends upon the authority which the state has conferred upon ¹⁸⁹² the police commissioners. By the seven hundred and forty-fourth section of the charter of Baltimore City (Acts of 1898, c. 123), the duties of the board of police commissioners are defined. It is made their duty "at all times of the day and night [to] preserve the public peace, prevent crime, and arrest offenders, protect the right of persons and property, guard the public health, . . . prevent and remove nuisances, . . . see that all laws regarding pawnbrokers, gambling, intemperance, etc., are enforced," etc. An examination of the entire section will show that these and many other duties are imposed on them for the purpose of preventing the perpetration of acts which are prejudicial to the peace, order, comfort, and health of the public. Preven-

tion of acts prejudicial to the general welfare is, in fact, their chief obligation. They must preserve order, protect the rights of persons and property, and prevent nuisances and crimes, etc. By what means they are to prevent crime is not defined; but it is clear that in exercising such a power they must act in accordance with well-established rules of persons and property, so that the rights of the citizens shall not be invaded under the pretense of protecting them. Subject to these limitations, they are charged with the duty of acting intelligently, astutely, and industriously in preventing every infraction of the law that would result in destroying or injuriously affecting the peace of society, or in the commission of crime.

In the case at bar the property seized, under the concessions of the demurrer, is an instrument "intended and designed to be used by the plaintiff and others in violation of the gambling laws," and one of such a character that "it can be put to no legitimate use." It does not, therefore, belong to the class of articles that may or may not be used for legal purposes. If it did, the presumption could not be made that the owner intended it for illegal purposes; and however the law may be, otherwise it is clear upon principle and authority that no seizure can be made, as a preventive measure, without it it had first been properly established that the article was procured and held for an illegal purpose. But if the article be of such a ¹⁹³ nature as to be incapable of being used for legal purposes, the presumption, as a matter of fact, would be that, being an unlawful article, it was intended for such uses only as it was capable of being put to; and in that event the appellee, to rescue himself from the charge of having in his possession an evil chattel, would be forced to show that he did not intend to use it at all, but was keeping it for some innocent purpose—as a curiosity, for instance. In *Commonwealth v. Coffee*, 9 Gray, 140, where a person was indicted for the larceny of brandy in Massachusetts, where liquor could not be legally sold, it was contended that having been bought to sell again, it was not the subject of larceny; the court held that notwithstanding it could not be legally sold, it was property, because it did not appear "that it was procured and held for an illegal purpose." In that case the owner did not forfeit his right to the property, because he held possession of the liquor, but because the illegal purpose of the possession had not been determined in the method the law pointed out. In the case at bar there can be no such difficulty, because by the demurrer it is admitted the

machine was held for an illegal purpose, and could not have been used for any other: *Monty v. Arneson*, 25 Iowa, 383. So in *State v. May*, 20 Iowa, 308, a person was indicted for stealing liquor; the defense was the sale of liquors was prohibited, but the court decided it was property that could be the subject of larceny, because "it may at any time be withdrawn as an article of trade, and be kept exclusively for private use."

There are, however, "certain instances" in which "the law refuses its full protection to property because of its hurtful character and on strict grounds of public policy." Thus, a burglar's or gambler's tools, or counterfeit money, may be seized and confiscated under appropriate acts: 2 Schouler on Personal Property, sec. 24. It is difficult to perceive any sufficient reason for the denial of this principle. Why should a person be left in the possession of counterfeit money? To what use could it be applied except an illegal use? If, on its seizure, the owner could show that it was not his bona fide intention to ¹⁸⁴ make any use of it at all, but was only keeping it as a memento or as a curious object, perhaps another case would be presented; but until that is made clearly apparent, it would have to be presumed that he intended to use it for the illegal purpose for which it was created, and for which it was only adapted. So, in the case at bar, no legal use can be made of the machine, and it would seem to follow, in the absence of proof to the contrary, that the appellee intended to put it to the illegal uses for which it was constructed, and for which alone it was capable of being used. And this would be so even if it were not admitted, as it is here, that its intended use was in violating the gambling laws of the state. What more effectual means for preventing crime than to deprive the thief or the burglar of the instruments of his evil trade? If, at midnight, a policeman find a person on the streets laden with burglar's tools hidden on his person, is he to permit him to go his way with his illegal burden? Is not the seizure of these instruments of crime a proper and reasonable thing for him to do? Would it not be conducive to the prevention of crime for the police officer charged with the enforcement of the law and the prevention of crime to do that? Must the owner be allowed to retain them until it can be shown that he has already made an illegal use of them or intends so to use them? So, also, as to a slot-machine, conceded in this case to be incapable of being used for legal purposes, it is a most effective manner of preventing its use to seize it as "outlawed" property. The

duty to prevent crime carries with it in such a case the power to summarily seize the offending article. It would be anomalous to hold that the legislature, in imposing on the policeman an obligation to prevent crime, intended to deny him one of the most effective means of performing such obligation. The power of the legislature to confer this authority, under the police power, cannot be questioned. If it can properly confer upon a milk inspector power to destroy milk summarily, as in *Deems v. Mayor etc. of Baltimore*, 80 Md. 173, 45 Am. St. Rep. 339, 30 Atl. 648, it may for the same reasons authorize the summary seizure and destruction of the tools and implements of crime.

¹⁹⁵ We have been cited to no case where these principles have been denied. Those relied upon by the appellee, some of which have already been adverted to, are not in conflict with them. Those are cases where the article seized may be put to legal as well as illegal uses, and until it has been shown before the proper tribunal that it was designed to be put, or has been put, to an illegal use, it cannot be seized as a preventive measure. But that is not the case at bar, because we here have it admitted not only that the slot-machine cannot be used for a legal purpose, but that the appellee intended to use it for illegal purposes. The subject has been learnedly and exhaustively discussed by Judge Redfield in the case of *Spalding v. Preston*, 21 Vt. 10, 50 Am. Dec. 68, in which the court sustained the view we have presented. That was an action of trover for certain counterfeit coin taken from a person who was afterward indicted. The coin was claimed by a third person without, however, accounting "for the unfortunate guise" in which it was presented. Redfield, J., delivering the opinion of the court, said, if trover under these circumstances can be maintained, then trespass would also lie for the taking of the property. Further, that the right of the sheriff to seize rests "upon grounds of preventive justice, aside of any statute whatever upon the subject"; and that the right to detain the base metal might be rested on two grounds: 1. For evidence; and 2. Because "courts of justice will not sustain actions in regard to contracts or property which have for their object the violation of law—such property is 'outlawed.'" And again, in *State v. O'Neil*, 58 Vt. 163, 56 Am. Rep. 557, 2 Atl. 586, where the court said "that articles or instrumentalities once impressed with the characteristics of adaptation and intended use for purposes prohibited by law and contrary to public peace, health,

or morals, are subject to summary seizure under statutory, or even general, police regulations."

In *Bales v. State*, 3 W. Va. 687, the court, while holding that poker chips might be the subject of larceny, said that "they could not have been recovered by action is clear, on the general principle that no court would lend its aid to the guilty ¹⁹⁶ keeper or owner to recover his illegal articles." This case is not cited as being approved in all respects by this court, but merely as sustaining the position that in a case like the present one the action of replevin will not lie: *Eichenlaub v. City of St. Joseph*, 113 Mo. 395, 21 S. W. 8. For these reasons the judgment must be reversed.

Judgment reversed and cause remanded for new trial.

Gambling Apparatus.—If a statute provides that gambling apparatus or implements are pernicious and dangerous to the public welfare, and that the keeping of them is a criminal offense, they are not lawful subjects of property which the law protects, and are liable to seizure and destruction without violating any constitutional rights of property: *Frost v. People*, 193 Ill. 635, ante, p. 352, 61 N. E. 1054.

When Replevin will Lie is the subject of the monographic note to *Sinnott v. Felock*, 80 Am. St. Rep. 741-767.

BALTIMORE BOOT AND SHOE MANUFACTURING COMPANY v. JAMAR.

[93 Md. 404, 49 Atl. 847.]

A MASTER IS BOUND TO EXERCISE ALL REASONABLE CARE, having respect to the nature of the service, to provide and to maintain safe, sound, and suitable machinery and instrumentalities for doing the work, and also to use due diligence and care in the selection and employment of competent and careful fellow-servants. If he observes these precautions, he is not liable to his servant for injuries sustained in the course of the employment, even though caused by the negligence of a fellow-servant under such circumstances as would have made the master liable to a stranger if the latter had been injured. (p. 433.)

IN THE RELATION OF MASTER AND SERVANT UPON CONTRACT OF SERVICE, express or implied, between the parties, the essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist. (p. 433.)

MASTER AND SERVANT—CONVICT EMPLOYEES.—As between a contractor and a convict whose labor he employs from the state, the relation of master and servant does not exist in its fullest

extent, because the convict is in involuntary servitude, and the control over him by the contractor is limited. (p. 433.)

MASTER AND SERVANT—DUTY TO CONVICT EMPLOYEE.—As between a contractor and a convict whose labor he employs from the state, the former should be held to a master's liability to the latter in respect to those incidents of the employment over which he has the same measure of control that a master ordinarily has, but not as to those features of the employment over which he is essentially deprived of such control. (p. 434.)

MASTER AND SERVANT — CONVICT EMPLOYEES — ELEVATOR ACCIDENT.—The relation which exists between a contractor and a convict whose labor he employs from the state is so far analogous to that of master and servant, that the contractor who has full control over the construction and maintenance of an elevator and uses that structure for his own benefit must be held liable to the convict employé for any injury which he suffers by reason of want of reasonable care on the part of the contractor in providing and maintaining the elevator in a safe and sound condition. (p. 434.)

MASTER AND SERVANT — CONVICT EMPLOYEES — NEGLIGENCE—ELEVATOR ACCIDENT.—A convict employé whose labor is employed by a contractor from the state is not guilty of contributory negligence in going underneath an elevator owned, maintained, and used by such contractor, when it is necessary for him to do so to operate it, and he has been assigned to that duty as a convict, and is compelled to obey such assignment; but he is guilty of contributory negligence if injured while underneath the elevator, if he could have operated it without going under it, or if before going under it or at the time of the accident he saw that it was caught at an upper floor, or if after he got under it he heard calls to him to stand from under and did not heed them. (pp. 432, 436.)

B. and C. H. Carter, for the appellant.

T. I. Elliott and H. W. Vickers, for the appellee.

408 SCHMUCKER, J. The appellee sued the appellant company in the superior court of Baltimore City for damages for injuries sustained by him, while he was a convict in the Maryland penitentiary, from the falling of an elevator attached to the shoe factory in that institution. The verdict and judgment were against the appellant and it appealed. The record contains but one bill of exceptions, and that relates to the action of the court upon the prayers.

There was evidence tending to prove the following state of facts: The appellant, in 1889, contracted with the directors of the penitentiary for the use of certain buildings and the labor of a given number of convicts, without specifying any particular ones, for the purpose of manufacturing boots and shoes. The buildings were inside of the penitentiary walls and the convicts whose labor was hired remained subject as convicts to the rules and discipline of that institution, and continued in its custody and were watched by its deputy wardens and guards

even while engaged at work in the factory. The selection of the particular convicts who were to labor under the appellant's contract and of the class of labor which each one was to perform, was made by the warden in obedience to section 467 of article 27 of the code.

The appellant erected the elevator for the convenience of its manufacturing operations with the consent of the prison authorities. It stood against the outside of the south wall of the factory building and communicated with the interior of the building at its second and third floors. It was an ordinary freight elevator constructed inside of a frame of timbers, and it was erected by James Bates, an experienced builder of elevators. After Mr. Bates had finished the elevator the appellant caused it to be entirely sheathed with boards on its east and west sides, and to be similarly sheathed on its north side from its top down to within about nine feet of the ground. There were windows in the sheathing on the north side through which, and the opening below them, the position of the elevator could always be seen from the yard on that side of the structure.

⁴⁰⁹ The elevator was raised and lowered inside of the sheathed frame by a wire cable, which was operated from a drum located inside of the factory building. This drum was set in motion and stopped by means of two shifting ropes, which were so connected as to form an endless rope suspended inside of the west side of the elevator sheathing, where there also hung a check rope, by pulling which the elevator could be stopped at any point. At the place where these ropes hung a hole was cut through the sheathing four or five feet above the ground and within a few inches of the factory building. There was a positive conflict of testimony concerning the size and purpose of this hole and the possibility of operating the elevator through it by one standing outside of the sheathing.

Five witnesses for the appellee, of whom three had operated the elevator and the other two had often seen it in operation, testified that this hole was only used to tap a signal bell, that you could barely get one hand through it and that it was impossible for one standing outside of the sheathing to operate the elevator through the hole. They further testified that the elevator was always operated from inside of the sheathing, and that when it was in the upper part of the frame it was necessary to stand underneath it to pull the shifting ropes to lower it. The appellee further testified that when he was first as-

signed to operate the elevator the appellant's manager explained to him how to use it, and in doing so went inside the sheathing underneath the elevator, and from that position pulled on the shifting ropes to lower it, and walked out before it reached the ground, and also told him that there was no danger in it; and that Marshall, who oiled and cared for the elevator, told him that it had safety-clippers on it, and it would not fall if the cable broke or slackened. Seven witnesses for the appellant, all of whom had either operated the elevator or frequently seen it in operation, flatly contradicted the appellee's witnesses as to the possibility of operating the elevator from the outside through the hole in the sheathing, and said that it not only could be operated in that manner with ease and safety, but that it was currently so operated.

⁴¹⁰ After the contract between the appellant and the prison authorities had been in operation for some time the appellee was convicted and sentenced to the penitentiary for manslaughter, and was assigned by the warden to labor under that contract. He was at first put to work inside of the factory, but was in November, 1891, assigned by the warden to operate the elevator, which he continued to do until February 27, 1893, when having gone inside of the sheathing for the purpose of lowering the elevator, the latter suddenly fell upon him and dislocated his spine, and greatly injured him.

Immediately prior to the accident a convict named Peacock, who had also been assigned by the warden to work in the appellant's factory, was bringing a truck down on the elevator from the third to the second story. When the elevator had nearly reached the second story he jumped off, but through his careless handling of the truck it was jammed between the second floor of the factory and the descending elevator, which was thereby stopped and held fast. The drum continuing to revolve, the cable was slackened, and when the truck was extricated the elevator fell upon the appellee. The elevator was provided with safety-pawls, operated by a spring, which were intended to automatically enter ratchets on the guide-posts of the structure and prevent the elevator from falling if the cable should break or slacken, but the appliance failed to do its work in this instance. A convict who was on the second story of the factory when the truck caught the elevator testified that he then called down to the appellee to get out from under it, but the appellee testified that he did not hear the call.

The appellant, for the purpose of explaining the failure of the safety-pawls to operate at the time of the accident, proved that immediately after the accident an iron plate on the elevator, which had held in position one of the four guide wheels intended to keep the elevator in line with the guide-posts, was found to be broken. Bates, a son and successor in business of the builder of the elevator, and Marshall, who had charge of keeping it in repair, and Williams, who had charge of the machinery in the factory, all testified that, in their opinion, a shock ⁴¹¹ such as the elevator would have received from being caught when descending by a truck on a floor of the factory would have been sufficient to break the iron plate and throw the elevator out of line with the guide-posts, and prevent the safety-pawls from operating. There was also evidence which will be hereafter noticed touching the current inspection of the elevator and its condition on the morning of the accident.

At the trial of the case the appellee, as plaintiff, offered four prayers, all of which were granted, the first being granted in connection with the defendant's prayers. The appellant, as defendant, offered nine prayers, all of which were either conceded or granted, except the first and second one, designated "A."

The plaintiff's first prayer in effect instructed the jury that the plaintiff was not guilty of contributory negligence in going underneath the elevator at the time of his injury, if it was necessary for him to do so in the ordinary and usual performance of the duty of operating it, if they further found that he had been assigned to that duty as a convict in the penitentiary and was compelled to obey such assignment. The defendant excepted specially to this prayer, because there was no legally sufficient evidence to sustain it, but we think the learned judge below did right in granting it. We are the better satisfied of the correctness of his action in that respect, because he granted it in connection with the defendant's prayers which instructed the jury that the plaintiff was guilty of contributory negligence if they believed that he might have operated the elevator from the outside without going under it, or that before he went under it at the time of the accident he saw that it was caught by a truck at the second floor, or that after he got under it he heard calls to him to stand from under it, and did not heed them.

The plaintiff's second prayer is the one which raises the cardinal issue in the case. It is as follows: "The plaintiff

prays the court to instruct the jury that it was the duty of the defendant, the Baltimore Boot and Shoe Company, to use ordinary care and diligence in keeping the elevator used by it in repair, and if they shall find from the evidence that the accident ⁴¹² resulting in injuries to the plaintiff, Jamar, occurred by reason of a defect in said elevator, which defect could have been discovered and remedied by the defendant previous to the accident by the use of ordinary care and diligence in inspecting said elevator, or if they shall find that the said accident happened by reason of an improper method of construction of said elevator, and shall further find that the plaintiff was in the usual, ordinary, and proper discharge of his duties as the conductor of said elevator when hurt, then their verdict must be for the plaintiff."

The defendant excepted specially to the granting of this prayer, because there was no legally sufficient evidence that the accident happened either from an improper method of construction of the elevator or from any defect in it which could have been discovered and remedied by the defendant previous to the accident. The defendant's three rejected prayers presented the same propositions as its special exceptions, but the rejected prayer "A" was broader than the exceptions in asserting a want of evidence that the plaintiff's injuries were caused by any negligence of the defendant or those for whose action it was responsible.

The measure of the liability, if any, of the appellant to the appellee must be primarily ascertained from an inquiry into the legal attitude in which the parties stood to each other at the time of the accident which forms the basis of the suit. If the relation of master and servant, in the full and ordinary meaning of those terms, existed between the appellant and the convicts hired to it, their reciprocal obligations and duties would not be difficult of ascertainment, for the principles governing them have been repeatedly announced by this and other courts. The master is bound to exercise all reasonable care, having respect to the nature of the service, to provide and to maintain safe, sound, and suitable machinery and instrumentalities for doing the work, and also to use due diligence and care in the selection and employment of competent and careful fellow-servants. If he observes these precautions he will not be liable to the servant for injuries sustained in the course ⁴¹³ of the employment, even though they were caused by the negligence of a fellow-servant under such circumstances as would

have made the master liable to a stranger if the latter had been injured: *Wonder v. Baltimore etc. R. R. Co.*, 32 Md. 416, 3 Am. Rep. 143; *Baltimore etc. R. R. Co. v. Stricker*, 51 Md. 60, 34 Am. Rep. 291; *State v. Malster*, 57 Md. 306; *Hanrathy v. Northern Cent. Ry. Co.*, 46 Md. 287; *Cumberland etc. R. R. Co. v. State*, 44 Md. 292; *Williams v. Clough*, 3 Hurl. & N. 258; *Hutchison v. Railway Co.*, 5 Ex. 343; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590.

The relation of master and servant rests upon a contract of service, express or implied, between the parties, the essential elements of which are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will, and for proper cause discharge, those who serve him. If these elements are wanting, the relation does not exist: *Wood on Master and Servant*, secs. 1, 4; 2 *Bailey on Personal Injuries Relating to Master and Servant*, sec. 3139 et seq.; 1 *Shearman and Redfield on Negligence*, sec. 160; 14 *Am. & Eng. Ency. of Law*, 1st ed., 745.

It is obvious, therefore, that in the present case, where the employment did not rest upon a mutual contract between the appellant and the convicts whose labor it used, and the former had not control over the selection or conduct of the latter, the relation of master and servant did not exist in its strict sense or to its full extent. This court held in *Brown v. State*, 23 Md. 509, that the labor imposed upon one convicted of crime is involuntary servitude, and the same definition was applied to it by the supreme court of Alabama in *Buckalew v. Tennessee Coal etc. R. R. Co.*, 112 Ala. 146, 20 South. 606. In the latter case, as well as in *Cunningham v. Bay State Shoe etc. Co.*, 25 Hun, 211, it was distinctly held that the relation of master and servant does not exist between a contractor and the convict whose labor he employs from the state. In these cases the decision was based upon the fact that the labor of the convict is involuntary and the control over him by the contractor is limited.

⁴¹⁴ On the contrary, cases are not wanting in which the contractor has been held liable to the convict hired to him for injuries to the latter upon the ground, either expressed or implied, that the relation of master and servant did exist between them: *Chattahoochee Brick Co. v. Braswell*, 92 Ga. 634, 18 S. E. 1015; *Porter v. Waters-Allen Co.*, 94 Tenn. 370, 29 S. W. 227; *Dalheim v. Lemon*, 45 Fed. 225.

In our opinion the legal principles applicable to such cases require that the contractor should be held to a master's liability to the convict whose labor he uses, in respect to those incidents of the employment over which he has the same measure of control that a master ordinarily has, but not as to those features of the employment over which he is essentially deprived of such control.

Applying these principles to the facts of the present case, we think that the relation which existed between the appellant and the appellee in respect to the transactions involved in this suit was in so far analogous to that of master and servant that the appellant, who had full control over the construction and maintenance of the elevator, and used that structure for its own benefit, should be held liable to the appellee for any injury which he suffered by reason of the want of the exercise of reasonable care on its part in providing and maintaining the elevator in a safe and sound condition.

It was not denied by the appellee that the mechanical design and the original method of construction of the elevator itself and the timber frame in which it operated were proper, or that if the appellant had not caused them to be inclosed in sheathing they would, when in good order, have been reasonably safe to operate. There was, however, much testimony tending to show that the addition of the sheathing prevented the operation of the elevator from the outside, and compelled the person in charge of it to incur the danger of going inside the frame and standing under the elevator in order to reach the shifting ropes for the purpose of lowering it. This testimony was stoutly contradicted, and a distinct issue of fact was thus presented to be determined by the jury as to whether the construction ⁴¹⁵ of the elevator as it stood at the time of the accident was improper.

It yet remains to be considered whether there was any legally sufficient evidence to support that portion of the plaintiff's second prayer instructing the jury to hold the defendant liable if they found that the plaintiff's injuries resulted from any defect in the elevator which might have been discovered by reasonable diligence in inspecting it previous to the accident. If the jury believed that maintaining the sheathing over the elevator, and especially over the portion of it where the shifting ropes were located, made its operation in that condition dangerous, that was of itself a defect that might have been discovered by the use of ordinary care and diligence in inspect-

ing the elevator. The fact that the elevator fell upon the appellee indicated, until its fall was explained, a defective condition of the appliances intended to prevent its falling. The jury may not have believed the evidence tending to explain its fall by an encounter with a truck managed by the convict, Peacock, at the second-story floor. The only evidence that inspections of the elevator were made was that of the appellant's witness, Marshall, who testified that he had charge of the engine and boiler at the shoe factory, and that he "looked after the elevator and kept it oiled"; that he examined it every morning and "would look at" the safety-clutches, guide-wheels, and springs, and oil the seats, and that was all that was necessary; and on being specially interrogated as to the condition of the safety-dogs on the day of the accident, he said that he had examined them both before and after the accident, and that "they were in good order," that "their condition was good." The witness was questioned at some length in reference to his examinations or inspections of the elevator, and although he several times explained how he made them, he did not state that he had at any of them made a test of the safety appliances by actually operating them to see whether they could be relied on in case of an emergency. The jury were entitled to pass upon the question whether these inspections of the elevator were made with ordinary care and diligence.

416 The testimony was very conflicting upon some of the most material issues in this case, but we cannot say that there was no evidence legally sufficient to go to the jury upon the propositions embodied in the plaintiff's second prayer. We therefore are of opinion that the learned judge below committed no error in granting the plaintiff's second prayer, especially in view of the fact that the defendant's theory of the effect of the alleged shock and injury to the elevator by reason of the convict, Peacock's, negligent handling of the truck, and also its theory of the sufficiency and effect of the inspections of the elevator made by Marshall, were given to the jury by the court in granting the defendant's sixth, seventh, and eighth prayers, which were drawn with admirable clearness and skill from the standpoint of the defendant.

Although the appellant also excepted to the granting of the appellee's third prayer, which instructed the jury as to the measure of damages, the objection to it was not argued in the argument of the case before us, and we think that it contained a correct presentation of the law on that subject.

It follows from what we have said that the judgment appealed from must be affirmed.

Judgment affirmed, with costs.

A Master Owes to His Servant the Duty of providing him a reasonably safe place in which to work, of providing and keeping in repair reasonably safe tools and appliances for the work to be done, and of exercising diligence in the employment of reasonably competent men to perform their respective duties: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 591, 592; *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519.

A Master is not Answerable for an injury to his servant occasioned by the negligence of a fellow-servant: *Newbury v. Getchel etc. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743; *Mann v. O'Sullivan*, 128 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375; *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519; unless the latter is unfit for the service, and this was known or should have been known to the master: *Park v. New York Cent. etc. R. R. Co.*, 155 N. Y. 215, 63 Am. St. Rep. 663, 49 N. E. 674.

A Convict is the Servant of the Person employing him. If the keeper of a prison places a convict in charge to protect his premises from trespassers, the relation of master and servant exists so as to make the keeper liable for injuries inflicted by the convict: See the monographic note to *Brown v. Smith*, 22 Am. St. Rep. 460.

MAYOR OF HAGERSTOWN v. KLOTZ.

[93 Md. 437. 49 Atl. 836.]

MUNICIPAL CORPORATIONS—DUTY TO PASS AND ENFORCE ORDINANCES.—A municipal corporation invested with power must not only enact such ordinances as are necessary to protect the lives, limbs, and property of its citizens, and prevent, suppress, and abate all nuisances and obstructions in its streets, but it must also exercise all reasonable care and diligence in the enforcement thereof. (p. 439.)

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY BY BICYCLE.—If a municipality, after passing an authorized ordinance prohibiting the riding of bicycles in the streets at an immoderate rate of speed, makes no effort to enforce it, and negligently permits such riding without interference upon a certain street until it becomes a nuisance dangerous to pedestrians thereon, the city is liable to a pedestrian, who, while exercising due and reasonable care, is knocked down and injured by a bicycle propelled with great speed upon such street. (pp. 438, 440.)

W. J. Witzenbacher, J. A. Mason, and R. J. Halm, for the appellant.

M. L. Keedy, A. C. Strite, and R. T. Edmonds, for the appellee.

⁴³⁸ SCHMUCKER, J. The appellee in this case instituted an action against the appellant for damages for an injury resulting from being struck and knocked down by a rapidly moving bicyclist on a public street in Hagerstown.

The appellant demurred to the narratio, and its demurrer having been overruled, filed pleas and went to trial upon the issue joined thereon, and the verdict and judgment being against it, appealed. The record contains no exceptions to the court's action upon the evidence or its instructions to the jury, and the main question therefore presented for our consideration is, whether the declaration stated a good cause of action. The declaration alleges the incorporation of the appellant, and that it was vested by its charter with control over its streets, and was given full power and authority to prevent, suppress, remove, ⁴³⁹ and abate all nuisances and obstructions thereon, and for the purpose of carrying out its powers, and for the preservation of the peace and good order of the community and the protection of the lives and property of its citizens, to pass and enforce appropriate ordinances. That in the exercise of the powers thus conferred on it the appellant, some time prior to the happening of the injury complained of, passed an ordinance to regulate bicycle riding within its corporate limits, by which it was provided that it should be unlawful for any person to ride a bicycle at an immoderate speed on its streets, and a fine was imposed for a violation of the ordinance. That by virtue of the power and authority conferred upon the appellant it became its duty, not only to pass such ordinances as were necessary to protect the lives and limbs of its citizens and prevent, suppress, and abate all nuisances and obstructions as aforesaid, but also to exercise all reasonable care and diligence in the enforcement of the same.

The declaration alleges further that the appellant negligently, carelessly, and wrongfully failed, refused, and omitted to enforce the provisions of said ordinance; that the provisions were negligently permitted to remain and be unenforced so as practically to be a dead letter, although immoderate bicycle riding, trials of speed between riders of bicycles, and racing of bicycle riders upon the streets of Hagerstown had become, and was at the time of the injury complained of, and for some time prior thereto had been, a nuisance upon that portion of West Franklin street, between North Potomac street and Walnut street—a menace to the lives and limbs of the citizens of said Hagerstown traveling along, upon, and across said West Frank-

the street at its intersection with said North Jonathan street, as well as at other places on said portion of West Franklin street; that on divers days and at divers times, both in the daytime and after night, immoderate bicycle riding, trials of speed, and racing between bicycle riders occurred on said portion of West Franklin street openly, publicly, and notoriously, and that the appellant negligently, carelessly, and wrongfully failed, refused, and omitted to enforce the provisions of said ~~ord~~ section 3; that by reason of the failure of the appellant, the provisions of said ordinance became and were treated and considered by persons riding bicycles on said portion of West Franklin street as a dead letter, or an ordinance the provisions of which could be violated with impunity. The declaration further alleges that on the fifth day of August, A. D. 1899, the plaintiff, whilst in the exercise of due care and caution on his part, was crossing said West Franklin street at its intersection with said North Jonathan street, and whilst so crossing was struck and knocked down by a certain person or persons unknown to the plaintiff, who were then and there riding at an immoderate speed along and upon said portion of West Franklin street at its intersection with said North Jonathan street, by reason of the carelessness, negligence, omission, and default of the appellant in the premises; that by reason of such carelessness, negligence, omission, and default of the appellant in the premises the plaintiff was seriously and permanently injured.

In the cases of *Mayor etc. of Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326, *Taylor v. Mayor etc. of Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027, and *Cochrane v. Mayor etc. of Frostburg*, 81 Md. 54, 48 Am. St. Rep. 479, 31 Atl. 703, this court held that a municipal corporation having powers similar to those possessed by the present appellant is bound to exercise them for the public good and to protect persons and property, and that its duty is not discharged by merely passing ordinances upon the subject. It can relieve itself from responsibility only by a vigorous attempt to enforce them. In *Marriott's* case the city was held liable for damages to the plaintiff, who suffered injury from falling upon ice which had accumulated upon the footway of one of the streets, in such manner as to constitute a nuisance and to obstruct and endanger the public in walking thereon, the injury having occurred after the lapse of a sufficient time after the city might, by the exercise of ordinary care and diligence,

have obtained notice of the condition of the street. In *Taylor v. Mayor etc. of Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027, the plaintiff was injured by being struck by a sled coasting on the public street at a high rate of speed at a place where large numbers of men ⁴⁴¹ and boys had for several days prior thereto been coasting at a rapid and dangerous rate of speed. This sport was held to constitute a nuisance of a dangerous character which the city should have suppressed. Inasmuch, however, as the city had through its police made a vigorous effort to suppress the coasting, and had so far succeeded in doing so that the sled by which the plaintiff was injured was the only one then on the street, the court, while affirming the principle of *Marriott's case*, held that the lower court should have submitted to the jury the question whether the defendant had used reasonable care and diligence to suppress the nuisance. In *Cochrane v. Mayor etc. of Frostburg*, 81 Md. 54, 48 Am. St. Rep. 479, 31 Atl. 703, the declaration averred that large numbers of horses, cows, hogs, and horned cattle were permitted to run at large upon the public streets until they—especially the horned cattle—became a nuisance and a source of danger to persons passing along the streets, and that, although the nuisance had become notorious, the city refused to take any steps whatever to abate it. The further allegation was made that the plaintiff while passing along the street with due care was attacked and seriously injured by one of the horned cattle so negligently permitted to be at large upon the street. The defendant demurred to the declaration and the demurrer was sustained. Upon an appeal this court held the declaration to be sufficient and reversed the judgment of the lower court. In the opinion in that case, the cases bearing upon the subject in both this and other states were reviewed, and although it was conceded that the law in some of the other states was different, the cases of *Taylor* and *Marriott* were affirmed and relied upon by the court in reaching its conclusion.

It is apparent that the allegations contained in the declaration in the present case, which we have already stated at some length, bring it within the principle of the last-mentioned cases. We think the learned judge below committed no error in overruling the demurrer filed by the appellant.

Nor was there any error in sustaining the demurrer to the appellant's third plea, which alleged that the injury complained of had been done by one Lester Davis, while conducting him-

self ⁴⁴² in accordance with the provisions of the ordinance regulating the use of bicycles on the streets. The plea in question amounted to general issue, for to aver that a third party committed the wrong alleged is the same thing as to say that the defendant did not commit it. The general issue is set up in the first plea, and under it the facts alleged in the third plea could have been offered in evidence, so that the appellant was in no aspect of the case injured by the court's action upon that demurrer.

The judgment appealed from will be affirmed.

Judgment affirmed, with costs.

A Municipality Having Powers to be exercised for the public good is liable for its failure to exercise them to any person who receives substantial damages therefrom: *Cochrane v. Mayor*, 81 Md. 54, 48 Am. St. Rep. 479, 31 Atl. 703. Compare *City of Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 85, 19 N. E. 726. It has been held that a city is not liable for the nonenforcement of an ordinance: *Fitch v. Seymour Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543, 36 S. W. 659; nor for the failure to enforce police regulations which provide for the prevention and abatement of nuisances: *Butz v. Cavanaugh*, 137 Mo. 503, 59 Am. St. Rep. 504, 38 S. W. 1104. But see *City of Zanesville v. Fannan*, 58 Ohio St. 605, 53 Am. St. Rep. 664, 42 N. E. 703. A city is not liable to one injured by persons coasting in the streets, though there is an ordinance prohibiting all sports in the streets tending to produce bodily harm, and the city officials have notice that the coasting is being carried on: *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1. See, also, *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, and note, 5 N. W. 842.

TOWNSEND v. EPSTEIN.

[83 Md. 537, 49 Atl. 629.]

EASEMENTS. — ABUTTING LOT OWNERS ON CITY STREETS have a right to easements of access, light, and air which cannot be taken for private use on any terms or under any conditions. (p. 445.)

EASEMENT OF LIGHT AND AIR—INJUNCTION TO PRESERVE—ESTOPPEL.—An abutting lot owner on a city street has an easement of light and air from such street, and is entitled to an injunction to prevent the erection of a private structure which will deprive him of such easement, notwithstanding the fact that such structure is authorized by an ordinance made for the benefit of a private individual, as such ordinance is void. Nor does the fact that the lot owner did not object to the passage of the ordinance, nor make known his objections until the structure was nearly completed, estop him from obtaining the injunction. (pp. 444, 452.)

MUNICIPAL CORPORATIONS—ORDINANCE AUTHORIZING OBSTRUCTION OF LIGHT AND AIR.—A city in the exercise of its right of control over streets can pass ordinances only for the benefit of the public, and not to promote a mere private interest. Hence it cannot authorize a private individual in his own interest to obstruct the light and air from the street, to the injury of abutting lot owners. (p. 449.)

INJUNCTION—PUBLIC NUISANCE—UNLAWFUL USE OF STREET.—If the injury complained of results from an unlawful and unauthorized use of the street constituting a nuisance and causing injury to the plaintiff different in kind from that suffered by the community generally, he is entitled to relief by injunction. (pp. 450, 451.)

INJUNCTION—INJURY FROM TUNNEL.—If an abutting owner on a city street is not injured by the construction of a tunnel under the street, he is not entitled to an injunction to prevent its maintenance. (p. 452.)

G. R. Willis, J. C. France, and L. M. Reynolds, for the appellants.

W. P. Whyte, I. L. Straus, and L. E. Rosenbaum, for the appellee.

547 JONES, J. This case presents questions of more than usual interest and importance, but we think principles enunciated in comparatively recent decisions of this court must so far control its decision as to render the solution of these questions free from difficulty. The facts giving rise to this litigation are as follows: The appellants (who were plaintiffs below) are the owners in fee of a lot of ground fronting about forty-nine feet on the south side of Fayette street, in the city of Baltimore, and running southerly, with uneven width, back to and abutting about sixty-eight feet on a small street known as Garrett street, which runs east and west parallel with Fayette street to the north of it, and with Baltimore street to the south of it. This lot is occupied by a large building, extending from street to street, which is used by the appellants as a factory for the manufacture of straw goods. In this building, looking out upon Garrett street, are a number of windows for the admission of light to the different floors thereof.

The appellee is the lessee and occupant of three parcels of ground, with the buildings thereon, fronting on the north side 548 of Baltimore street, and extending northerly to Garrett street, and is conducting upon these premises a large merchandising business. For the purpose of this business he has recently purchased a lot of ground lying between and abutting on

Fayette and Garrett streets, fronting on the south side of the former and extending back to the north side of the latter street, and situated immediately opposite to where his premises, lying between Baltimore and Garrett streets, abut on the latter street, and to the west of the premises of the appellants. Upon this lot he proposes to erect a six-story warehouse, and to establish communication between that and the premises and buildings occupied by him on Baltimore street by a tunnel under and a structure above and across Garrett street. The tunnel has been constructed. The structure across Garrett street has also been nearly completed. This is an inclosed structure, about thirty-three feet to the west of the premises of the appellants, and is about seventeen feet above the surface of the street. It is now connected with the building of the appellee which fronts on Baltimore street and extends back to the south side of Garrett street, is thirty feet in width, running with the latter street, and is built three and a half stories high across it to where this structure is intended to be connected on its north side with the warehouse which the appellee proposes to there erect.

Before proceeding to construct this tunnel or to erect this connecting structure, the appellee applied for, and procured from the mayor and city council of Baltimore, after complying with all formal requirements, the passage of an ordinance purporting to grant to him the privilege and right, under regulations therein prescribed, to construct such tunnel under Garrett street, and to erect an inclosed superstructure across said street to "connect one or more floors of the premises of Jacob Epstein on West Baltimore street with the corresponding floor or floors of the building or improvements to be erected by him on the south side of West Fayette street and the north side of West Garrett street." This ordinance recited that this right was granted "for the convenience of the public having business with Jacob Epstein."

549 The appellants began this suit by filing a bill in equity charging in substance that this ordinance in attempting to grant to the appellee the right to build a tunnel under and a structure over Garrett street as therein provided is invalid and void; and that the attempt made by the appellee to exercise such right is an invasion of their rights as abutting lot owners on said street. They pray that the said ordinance shall be declared invalid and inoperative, and that the appellee be perpetually enjoined from digging the tunnel and from

erecting the superstructure as proposed, and that he be required to restore the earth removed from the tunnel and to take down and remove such part of said superstructure as had already been erected. The trial court refused the relief prayed for by the appellants and decreed that their bill be dismissed.

Garrett street is a public street of the city of Baltimore, and as such subject to the same control of the municipality as it has over all of its streets and highways. The rights of the parties to this controversy are therefore to be determined from their relation to this street as a public street or highway of the city. This being now fully conceded, and, if not conceded, being incontrovertibly shown, we need not undertake to trace the history of this street with a view to defining its status as involved in the present contention. The appellants in their bill based their claim to relief upon a different theory, as to this status, which, in the brief of their counsel, is practically abandoned, and in view of the proofs in the case properly so, as their rights depend upon the conditions actually existing. Besides this, the appellants and appellee, as lot holders abutting on this street, claim under the same source of title, and to this same source is due the dedication of the street in question, among others, as a highway to "be so deemed and taken to all intents and purposes whatever."

It would seem, therefore, that the appellants, as against the appellee, can claim no greater rights in or over this street than such as belong to both parties as abutting owners upon this highway. The question, therefore, is, Do these rights entitle the appellants to the relief prayed for in their bill against the ⁵⁵⁰ acts of the appellee in respect to the street in question which are therein complained of? In determining this we are to inquire, What are the rights of the appellants? Have they been injured in respect to those rights in such manner as to entitle them to a remedy against the appellee? If so, are they entitled to the particular remedy which they have sought in this proceeding? That owners of lots or ground abutting upon the public streets have rights in the easement, which are valuable, and are in addition to those which they have in common with the general public, is recognized in our statute law which confers upon the city of Baltimore the power for laying out and closing up streets, by providing for compensation to such owners upon the closing of an adjacent street: Act 1898, c. 123, sec. 6, subtitle

"Streets, Bridges, and Highways," the same provision being formerly contained in Code, art. 4, sec. 806, Public Local Laws.

Such right of the abutting owner thus recognized was enforced by this court in the case of *Van Witzen v. Gutman*, 79 Md. 405, 29 Atl. 608, where it was said: "It is recognized by the statute that abutting owners have interests in the street or alley which are valuable, and that these cannot be taken for the public use without compensation. It is believed that no one will contend that they can be taken for private use on any terms whatsoever. Certainly such a doctrine has never at any time found any toleration in this state." In the case just referred to relief was sought against the obstruction of the public alley there in question, so as to cut off the complaining lot holders from ingress and egress from and to another public street, and to destroy the right of passage out and over said alley to this street. The obstruction of the alley was attempted by proceedings under the authority of an ordinance of the mayor and city council of Baltimore, providing for the closing of the alley. This court held that the use for which the alley was authorized to be closed was not a public, but a private, use, and that therefore the ordinance authorizing the closing of it was void upon the ground, as appears from the quotation just made, that the abutting lot holders, who were ⁵⁵¹ there seeking relief, had valuable rights in the easement of the alley, and could not be deprived, against their consent, of these rights for any but a public purpose, and then only with compensation.

Now, this valuable property right in the public street which this court upheld in the case just referred to embraces something more than the mere right of passage over the surface of the street which was the right more directly involved in that case. The abutting lot holder has the right to the enjoyment of the light and air which the highway affords. To deprive him of this right would be to impair, or, it might be, to destroy, the comfort, enjoyment, or use to be derived from the easement to which he is entitled; and we find this recognized by very high authority. In 2 *Dillon on Municipal Corporations*, fourth edition, section 712, it is said: "There is a large class of cases in which no recovery can be had for mere consequential injuries to adjacent property from the construction of public improvements in the streets, towns, and cities, the lot owner holding subject to the right of the public to use the streets for any purpose consistent with the legitimate uses

for which they were dedicated or acquired; but lot owners have a peculiar interest in the adjacent street, viz., easements of access, light, and air, which are property rights, and as such are as inviolable as the property in the lots themselves; and they may recover from the company making such improvements such damages as they may sustain by injuries to or invasions of such easements." Again, in the case of *Field v. Barling*, 149 Ill. 556, 41 Am. St. Rep. 311, 37 N. E. 850, the court said: "It will not be necessary to cite authorities in support of the proposition that a private individual cannot appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use. . . . The dedication of the strip of land for a public street embraced not only the surface of the ground, but the light and air above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the surface of the soil."

The case just cited is peculiarly apt here, because it deals with facts and conditions very similar to those presented by ⁵⁵² the case at bar. We may also refer to the case of *Barnett v. Johnson*, 15 N. J. Eq. 481, 487, 488, in which the court discusses the question whether the Morris canal was a public highway, which being determined affirmatively, the court in the course of discussing the further question as to the rights of an abutting property owner in respect to light and air from this highway saying: "There are two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air"; and again, in the course of the opinion occurs this emphatic language: "Where a strip of land is declared a public highway, the adjoining owner has a right to light and air from it. The column of light and air above the roadbed, whether of land or water, is as much a part of the highway as the roadbed itself."

It is thus seen that the right of the abutting owner to light and air from a public highway as part and parcel of the easement is distinctly recognized in the authorities when such right has been drawn in question, and it rests upon sound and ob-

vious reason. Recognition of this right is not at all at variance with the decisions of this and other courts of this country in regard to the doctrine of ancient lights, which hold that such doctrine is unsuited to conditions here. The case of *Cherry v. Stein*, 11 Md. 1, cited and relied upon by the counsel for the appellee, is an illustration of these cases. The doctrine of ancient lights that they repudiate involves an abridgment of the use which an owner can make of his own property. It puts upon the property of one a servitude in favor of another. This is not the nature of the right to light and air from a highway which belongs to an abutting owner as part of the easement. This right to light and air is the distinct right of every abutting owner; and in claiming protection for it such owner is not imposing a servitude upon his neighbor's property for ⁵⁵³ his benefit, but is only asserting his equal right with his neighbor to the enjoyment of an easement common to them both.

Nor is there anything, as counsel for appellee insist, in the case of *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597, in denial of the right we are here considering. The structure complained of in that case as interfering with the light and air from the street was erected under the authority of an act of assembly, and an ordinance in pursuance thereof which extended and secured to all persons alike who resided within the limits designated in the ordinance the right to erect, under regulations prescribed, "steps, porticos, or porches, or other architectural ornaments to houses fronting on Mount Vernon place." This was a privilege in the interest of the general public and tending to the general comfort and enjoyment of the homes in the district to which the ordinance applied. The court found that the structure complained of was one of a kind which the ordinance authorized, and was therefore a lawful structure, and refused to have it abated as a nuisance, which it was claimed to be.

We have seen, now, the nature and extent of the rights of the appellants in and to the street of the obstruction of which they complain. If the public easement has been improperly and unlawfully obstructed by the appellee, then he has been guilty of creating a nuisance; and if the appellants have suffered therefrom an injury different in kind from and beyond that suffered by the community generally; or special and particular damage resulting to them by reason of the nuisance, then they have a right to their private remedy for such in-

jury: *Garitee v. Mayor etc. of Baltimore*, 53 Md. 422; *Field v. Barling*, 149 Ill. 556, 41 Am. St. Rep. 311, 37 N. E. 850. To discover what injury, if any, the appellants have suffered from the acts of the appellee, and the character of the injury, resort must be had to the proof. This does not show that the appellants have suffered, or are suffering, any injury from the tunnel constructed under the bed of the street in question, as has been described. In reference to the superstructure the proof shows that it tends to and does diminish and obstruct the light from ⁵⁵⁴ the street to the premises of the appellants. There was evidence upon the part of the appellee tending to contradict this, but the decided preponderance of testimony is with the appellants upon this point. The non-expert witnesses testifying on their behalf testified from actual observation of the conditions, in respect to light, made upon the premises of the appellants where these premises were affected in this particular by the superstructure; while those testifying on behalf of the appellee made their observations from other points, and their evidence was more, therefore, the expression of opinions formed upon inferences drawn than a statement of actual facts. Expert testimony was offered on the part of the appellee with a view, and tending to show, that the superstructure in question could not hinder, but rather tended to improve, the light to the premises of the appellants. This was opposed by expert testimony upon behalf of the appellants, which was much more satisfactory and much more consistent with common sense and common observation, to the effect that such a superstructure as the one in question, and so located with respect to appellants' premises, necessarily tended to obstruct the access of light to, and to diminish it in, said premises.

It appears, therefore, that the appellants have suffered injury from the erection of the superstructure complained of. It further appears that this injury is one different in kind and degree from, and in addition to, such injury as the general public suffer by reason of the obstruction. This results from the situation of the premises of the appellants with respect to the obstruction, and the nature of the use of these premises and the construction of the part thereof abutting on Garrett street. The proof shows that in the part thus abutting there are many windows, as to some of which, in the lower floors of the building, there is an entire dependence for light upon Garrett street. The premises are used for manu-

facturing purposes, for which a proper supply of light is more of a necessity than a mere matter of comfort or convenience. It is further shown that owing to the diminution of light resulting from the obstruction in question, the appellants have been compelled to ⁵⁵⁵ resort to an increased supply of artificial light for the purposes of their business. These considerations would seem to make a distinct difference between the injury to the appellants caused by the obstruction of which they complain as a nuisance, and that suffered by the general public. It is contended on behalf of the appellee, however, that though there may result injury and inconvenience to the appellants from the erection and maintenance of the structure in question, the appellants have no cause of action, and are without remedy, because the structure is a lawful one, in that it was authorized by the ordinance of the mayor and city council which has already been referred to.

The corporation, the mayor, and city council of Baltimore is invested with the title to and control over the public streets. This control, however, is not an arbitrary control. The streets and highways are held in trust for the benefit, use, and convenience of the general public. There are many ways in which the power to control and regulate the use of the streets can be, and must be, exerted by the municipality to meet the necessities and the convenience of an urban population; but the exertion of this power must have for its object a public purpose. It is not in accord with the trust upon which the municipality holds the streets, nor with the nature of the control which it has over them to make use of the power and authority with which it is invested in that regard to promote a mere private purpose, to subserve a mere private interest, or to subordinate the right of one citizen in the streets, or in a street of the city to the private interest and convenience of any other. In the case of *Van Witzen v. Gutman*, 79 Md. 405, 29 Atl. 608, this court held that this could not be done even if compensation were made, and though done under the guise of serving a public purpose. A fortiori it cannot be done without compensation. We are confronted here with the same inquiry that the court was called upon to make in the case last cited.

Was the ordinance under which the appellee here undertakes to justify the acts complained of passed to subserve a public purpose, or does it serve a mere private purpose and private ⁵⁵⁶ and individual interest? Upon the face of it, it seems to

recognize the limitations upon the right and power of the municipality to pass ordinances of this nature by expressing its object to be "for the convenience of the public having business with Jacob Epstein." This is a rather thin disguise. It is but another form of saying, to promote the private business of Jacob Epstein and his convenience in respect thereto. How does it serve the general public or a public purpose to facilitate Jacob Epstein, at the expense of his neighbors, in attracting customers to, and serving them at, his store? Aside from this the proof makes it perfectly clear that only private interests are to be subserved by the privileges obtained under the ordinance in question. The appellee in his testimony says: "That he intends to use this superstructure after his Fayette street building is completed as a means of egress and ingress from the Baltimore street premises to his Fayette street premises, for his customers and his help on the floor; that if anybody wants to go through there, to use it as a way to go between Baltimore and Fayette streets, he would not object, but that he does not intend it for a public thoroughfare." This only condenses what sufficiently appears otherwise, and evidences the absolutely private purpose for which the structure is to exist and the private control that it is to be under. If the municipality can grant a privilege of the character of the one here in controversy, it implies a power to practically destroy a street as an open, light, and comfortable highway, and its use for the purposes of residence or business by the abutting owners in total disregard of the rights of such owners. If the privilege be granted to one, it cannot be denied to others who may apply for it in like circumstances; and the grant of such privilege might go to the extent of practically transforming any part of a street from an open highway affording unobstructed passage, light, and air into a covered and darkened way. The exercise of such a power as was attempted in the ordinance to which reference has been had cannot receive the sanction of this court. The ordinance, for the reasons assigned, is an invalid act, and affords to the appellee no bar to the legal redress to which the ⁵⁵⁷ appellants are entitled for the injury caused to them by the acts of which they here complain.

It remains now to inquire whether the appellants are entitled to the particular remedy which they have invoked in this case. It is contended by counsel on behalf of the appellee that this legal redress, if the appellants be entitled to any,

can only be by way of a suit or suits at law for consequential damages caused by acts of the appellee which they seek to make the grounds of action. They here invoke a principle that is illustrated and applied in a class of cases of which the case of *Garrett v. Lake Roland etc. Ry. Co.*, 79 Md. 277, 29 Atl. 830, is an example. That principle is applied, however, in cases where the public street is put to some additional lawful use—a use not inconsistent with its use as a highway, and a use intended to further serve the public interest and convenience. In such cases the injured property owner cannot prevent the lawful use to which the street is put, but can only recover damages for any consequent injury. This principle is not applicable, however, to a case, such as we find this to be, where the injury complained of results from an unlawful and unauthorized use of the street. In such a case there is no reason why the injured party should not have such remedy as may give suitable redress. In this case the appellee is unlawfully obstructing a public street as respects its character as an open highway, and the light and air which as such a highway it affords. The appellants have shown, as we have seen, that they are injured by the obstruction in such way as to entitle them to redress. The obstruction is a continuing one, operating to their annoyance, inconvenience, and pecuniary loss from day to day. Though they would be entitled to recover damages at law for the injury and loss to which they are subjected, they could not recover for the whole damage, past and prospective, in one suit, but only for damages to the time of suit brought. These damages would be difficult to estimate, and in any one case would be comparatively trivial. In seeking redress at law, therefore, they would be driven to a multiplicity of vexatious and unprofitable suits and continuous litigation. To tell ⁵⁵⁸ them that this is the only redress they can have would be to say that all the law can do for them is to aggravate the nuisance from which they are already suffering. “To suppress oppressive and vexatious litigations” is one of the grounds of equity jurisdiction in regard to public nuisances: 2 Story’s Equity Jurisprudence, sec. 924; *Amelung v. Seekamp*, 9 Gill & J. 474. Elliott on Roads and Streets, at page 497, speaking of the phrase “irreparable injury,” says: “It does not necessarily mean as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proved, so that in an

action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one." In the present case to seek redress at law would, for the reasons given, prove vexatious and oppressive to the appellants, and it is entirely apparent from the circumstances of the case that no adequate redress can there be afforded them. They have properly sought redress by injunction to have the nuisance they complain of abated and its future continuance prevented.

The further contention on behalf of the appellee is that the appellants are estopped from maintaining their present suit because of acquiescence on their part in the erection of the structure now complained of, or of laches in not sooner making known their objection to the same. This contention is based on the grounds: 1. That there is evidence that Mr. Townsend, one of the appellants, when consulted by the appellee in regard to his plans, which included the construction of the tunnel under and the structure across Garrett street, gave his assent to the same, and even encouraged the appellee to carry them forward; 2. That pending the proceedings for procuring the ordinance to authorize the carrying out of the plans of the appellee, the appellants did not appear to make any objection or offer any suggestion as to the same; 3. They stood by and saw the tunnel completed and the superstructure nearly so before making known the objections they now urge.

550 In regard to the first of these grounds it may be sufficient to say that the evidence fails to clearly establish it. The appellee testified on his own behalf to the purport which has been indicated as to what was said by Mr. Townsend when the appellee sought him in reference to his plans, etc. Mr. Townsend, however, denies that the conversation was as detailed by the appellee, and gives quite a different version of it. Besides this, Mr. Townsend is only one of the appellants, and if the conversation occurred between him and the appellee, as the appellee states, there is no evidence that he communicated it to his coappellants and co-owners with him of the abutting property which they occupied, and we may at least express a doubt whether an express acquiescence on his part in the plans of the appellee would bind his partners as respects the interests they had in the property. As to the second, it is not perceived how the failure to object to an ordinance which we find to be invalid and inoperative could give to the ordinance

validity or effect, or to authorize an act which with or without the ordinance was unlawful and a public nuisance. As to the third ground, the appellants could not complain of injury to themselves until it was ascertained that injury would result to them from the acts of the appellee. They seem to have been prompt to act when that discovery was made. Until then they had only the right to object as members of the public, and their failure to object in that capacity could not render a public nuisance lawful. What has been said as to the title of the appellants to relief does not apply to the tunnel, since they have shown no injury resulting to them from this construction or maintenance of that.

From the foregoing views it follows that the decree of the court below must be reversed and the cause remanded, that a decree may be passed in accordance therewith.

Decree reversed with costs to the appellants and cause remanded.

Easements of Light and Air.—Every owner of a lot abutting on a public street has an easement for the free admission of light and air: *Gans etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, 20 S. W. 658; *Willamette Iron Works v. Oregon Ry. etc. Co.*, 26 Or. 224, 46 Am. St. Rep. 620, 37 Pac. 1016. The column of light and air above a roadbed is as much a part of the highway as the roadbed itself; and when cities have been built up along a public highway, the right to light and air from it becomes vested. This right may be preserved by injunction. Even the legislature has no power to deprive an abutting owner of it without compensation: *Field v. Barling*, 149 Ill. 556, 41 Am. St. Rep. 811, and note, 37 N. E. 850.

UNITED RAILWAYS AND ELECTRIC COMPANY v. DEANE.

[93 Md. 619, 49 Atl. 923.]

CARRIERS—ASSAULT BY DISORDERLY PERSON—LIABILITY FOR.—If there is danger of any passenger on a railroad train, street-car, or other means of transportation, being assaulted and injured by a disorderly passenger or stranger, and the employees of the carrier fail to remove, subdue, or overpower such turbulent person, having the means to do so, after knowing that there is such danger, or after they ought to have known it if they had exercised proper care, they are guilty of negligence, for the consequences of which the carrier is liable. It is not the peril which a particular individual is in that is to be considered in such case, as it is the duty of the carrier to protect all of his passengers. (p. 456.)

CARRIERS—LIABILITY FOR ASSAULT ON PASSENGER BY DISORDERLY PERSON.—If a drunk and disorderly person after assaulting a passenger is ejected from a street-car, it is the plain duty of the employes who put him off to have kept him off, they having demonstrated their ability to do so, and if he is permitted to again board the car and then assaults another passenger, the employes are guilty of negligence causing the injury, for which the carrier is liable. (p. 457.)

F. C. Slingluff, T. R. Slingluff, and G. D. Penniman, for the appellant.

J. P. Poe, D. B. Chambers, and J. R. M. Staum, for the appellees.

⁶²³ **McSHERRY, C. J.** This suit was brought in the name of the state of Maryland to the use of the widow and children of Frank H. Deane against the United Railways and Electric Company of Baltimore, to recover damages for the injury caused to the equitable plaintiffs by the death of Mr. Deane. His death is alleged to have been the result of the defendant's negligence, and the negligence charged consisted in the failure of the ⁶²⁴ company's servants to protect the deceased, whilst he was a passenger on one of its cars, from the deadly assault made upon him by a fellow-passenger. The main question in the case is whether there was sufficient evidence of negligence to justify the trial court in allowing the case to go to the jury. At the close of the evidence adduced in behalf of the plaintiff the defendant requested the court to withdraw the case from the consideration of the jury. That request was refused and the defendant reserved an exception. The defendant then offered evidence on its part, and when all the evidence on both sides was in, it renewed the request previously refused and presented several other prayers for instructions to the jury. The request to withdraw the case from the jury was again refused, though the court granted several other prayers submitted by the defendant. The refusal to grant the first, third, and tenth prayers, which asked to have the case taken from the jury, the refusal to grant the defendant's eighth prayer, and the granting of the plaintiff's first prayer constitute the rulings assigned as error in the second exception. No point has been made upon the plaintiff's prayer and we need not allude to it further than to say that it fairly submitted the law of the case to the jury. The first exception is out of the case, because the presentation of evidence by the defendant after the court had declined to take the case from the jury on the evidence of the plain-

tiff was a waiver of that exception. That proposition has been so recently decided in *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337, that we shall not pause to discuss it. We therefore come to inquire as to the legal sufficiency of the evidence to support the averments of the declaration.

It may not be amiss, at this point, to state briefly the legal principles applicable to such a case as this, though they were considered and announced not long ago in *Tall v. Baltimore Steam Packet Co.*, 90 Md. 248, 44 Atl. 1007. "A carrier is not an insurer of the absolute safety of his passengers; yet he is bound to use reasonable care according to the nature of his contract; and as his employment involves the safety of the lives and limbs ⁶²⁵ of his passengers, the law requires the highest degree of care which is consistent with the nature of his undertaking: *Baltimore etc. R. R. Co. v. State*, 60 Md. 449. This, though the measure of the carrier's duty as between him and his passenger in respect to acts or omissions of the carrier and his servants toward the passenger, is not the standard by which his liability to the passenger is to be gauged or determined when intervening acts of fellow-passengers or strangers directly cause the injury sustained whilst the relation of passenger and carrier is subsisting. Such an injury, due in no way to defects in the means of transportation or to the method of transporting, or to an actual trespass by an employé whilst the relation of passenger continues, and involving, therefore, no issues of negligence concerning the duty to provide safe appliances and competent and careful servants to operate them, but arising wholly from the independent misconduct of a third party, furnishes a ground of action against the carrier only when the carrier or his servants could have prevented the injury but failed to interfere to avert it. The duty of the carrier in such instances is, consequently, relative and contingent, not absolute and unconditional. . . . The negligence for which, in such cases, the carrier is responsible is not the tort of the fellow-passenger or the stranger, but it is the negligent omission of the carrier's servants to prevent that tort from being committed. The failure or omission to prevent the commission of the tort, to be a negligent failure or omission, must be a failure or an omission to do something which could have been done by the servant; and, therefore, there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and

that he had that knowledge, or had the opportunity to acquire it sufficiently long in advance of its infliction to have prevented it with the force at his command." It is not because a particular passenger is known by the carrier's servants to be in peril of injury at the hands of a fellow-passenger or stranger that a failure to use the means at command to protect him will be actionable negligence; but it is because ⁶²⁶ there is a known or discoverable danger that an injury may be done to some passenger, and because no effort is made to avert that injury from all the passengers, that the carrier is liable if an injury is inflicted on one of the passengers when it could have been prevented. It is just as incumbent on the carrier to protect all his passengers from assault by a fellow-passenger when his servants have knowledge or the means of knowing that an assault on some one is imminent, and when they have time and means to avert it, as it is to protect all his passengers from injuries likely to result from defective means or methods of transportation. Consequently it will not do to say, after an assault has been made, that the servants of the carrier did not know or could not have foreseen that the particular individual who was assaulted would be injured by an assault if they were apprised, or with proper care could have known, of circumstances which indicated that some one would be injured unless the disorderly passenger or stranger were ejected or controlled.

Turning to the facts, the usual conflict between the witnesses for the plaintiff and defendant encountered in personal injury cases is found in the record, though there are some circumstances about which there is no controversy. It is quite a familiar doctrine that in dealing with a request to withdraw a case from the consideration of a jury the court has nothing to do with the weight of the evidence, but is confined strictly to determining whether there is any evidence legally sufficient to sustain or justify a recovery. The truth of the evidence adduced on behalf of the plaintiff, no matter how flatly contradicted, must, therefore, be conceded, except in very rare instances where it is physically impossible that it could be true. Upon the hypothesis that it is true the sole inquiry is, Will it warrant a jury in finding a verdict for the plaintiff? If it will, then the case must go to the jury. If it will not, then the jury should not be permitted to deal with it at all.

Now, it is not disputed that on Sunday afternoon, September 17, 1899, the deceased got on a car of the defendant railway company on ⁶²⁷ South Charles street, going north; that at the corner of Charles and Cross streets a man named Geisenkotter boarded the same car; that Geisenkotter was very drunk, boisterous, and disorderly; that he assaulted a passenger on the rear platform, and acted like a maniac. Either because of the assault which he made on the passenger upon the rear platform, or because of his violent and threatening conduct, he was ejected from the car at the corner of Charles and Barre streets by the conductor and motorman. It is practically conceded that he was not a fit person to be upon the car, which was quite crowded with passengers, and, therefore, that he was properly put off. But when the car started he again got on, and though the conductor saw him get on and the motorman saw him after he was on, they did not at once make an effort to remove him. Though the car stopped at Charles and Conway streets, one square north of where Geisenkotter had re-entered the car after having been ejected, no attempt was made to remove him notwithstanding his continuous disorderly conduct. The next street north of Conway is Camden. The car stopped there but still no effort was made to put Geisenkotter off. From this point there is a divergence in the evidence. According to the testimony of plaintiff's witnesses, whilst the car was proceeding from Camden street toward Pratt street, Geisenkotter, without the slightest provocation assaulted Mr. Deane, striking him a vicious blow in the eye, which caused the rupture of a cerebral blood vessel and thereby produced paralysis and ultimately death. On the part of the defendant it was shown that an effort was made to eject Geisenkotter at Pratt street; that at each intersecting street search was made for a police officer, but none was found, and that after the car passed Baltimore street, and before it reached Fayette street, the fatal blow was struck. The company insists that it was not derelict in its duty to the passenger because its agents did not know, and had no reason to apprehend, that Deane was in imminent danger of injury at the hands of his drunken and disorderly fellow-passenger; and the question was asked during the argument, What did the employes fail ⁶²⁸ to do that they ought to have done and which if they had done would have prevented the injury?

It may be true that there was no reason to suppose that Mr. Deane, rather than any other passenger, was in imminent peril. But that is not material. As already observed, it is not the peril which a particular individual is in that is to be considered in a case of this kind. If there is danger of any one being injured, and the employés fail to remove, subdue, or overpower the turbulent individual after knowing that there is danger, or after they ought to have known that there was danger if they had exercised proper care, that failure is negligence, for the consequences of which the company is answerable. So the case comes down to the inquiry, Was there evidence tending to show that the employés of the defendant failed to do what they ought to have done under the circumstances?

There ought to be no difficulty in answering this question. If Geisenkotter, who had assaulted another passenger before he was ejected from the car, and who was drunk, disorderly, and turbulent, was properly put off the car because his presence was a menace to other passengers, then it was the plain duty of the employés who put him off to have kept him off. They demonstrated their ability to keep him off by having put him off. If he had been kept off after having been put off he could not have assaulted Deane. Whilst his assault on the other passenger did not necessarily indicate that he would subsequently strike Mr. Deane, it did show that he was in a condition which rendered it very probable and likely that he would attack some one else, and this was known to the employés sufficiently long before the assault was made on Mr. Deane to enable the conductor not only to put Geisenkotter off, but to have kept him off the car. It cannot be doubted that if there was sufficient reason for putting Geisenkotter off the car so that injury to other passengers might be avoided, there was equally sufficient reason for keeping him off; and the failure to do this when there was power to do it was an act of negligence which caused the injury to and the ~~and~~ death of Mr. Deane. If, on the other hand, every effort was made by the employés to avert the injury, but was made without success, then the company would not be liable. This was plainly said to the jury, and it was a question of fact which was properly left to them.

The eighth prayer was rightly rejected. It sought to exculpate the defendant unless the jury should find that after Geisenkotter re-entered the car the defendant's servants knew

or should have known, of the danger to the deceased. This prayer was faulty for two reasons: 1. It eliminated all the facts that had preceded Geisenkotter's expulsion from the car, and narrowed the investigation to the occurrences which took place after he had returned, though the things which transpired before he was put off explained and threw light on what happened after his re-entrance; 2. It undertook to confine the jury to a consideration of the danger to Deane, though the company's liability depended, not on that fact, but upon the circumstance that anyone was in peril.

Upon the whole record we think there was sufficient evidence to go to the jury on the question of negligence, and it was their exclusive province to weigh its value and probative force. They evidently believed the version of the unfortunate affair which was narrated by the witnesses for the plaintiff, for they returned a verdict against the defendant, and it is not for us to say that they were mistaken in doing what they did. As no error was committed by the trial court, the judgment will be affirmed, with costs.

A Common Carrier is Bound, so far as practicable, to protect its passengers from violence committed by strangers and copassengers: *Haver v. Central R. R. Co.*, 62 N. J. L. 282, 72 Am. St. Rep. 647, 41 Atl. 916. A carrier is liable for negligently failing to protect its passengers from the acts of riotous or intoxicated fellow-passengers: See the monographic note to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 92. That a carrier may expel an obnoxious or drunken passenger, see *Vinton v. Middlesex R. R. Co.*, 11 Allen, 304, 87 Am. Dec. 714; *Spade v. Lynn etc. R. R. Co.*, 172 Mass. 488, 70 Am. St. Rep. 298, 52 N. H. 747.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

LAVIGNE v. LIGUE DES PATRIOTES.

[178 Mass. 25, 59 N. E. 674.]

BENEFIT SOCIETY.—AN ILLEGITIMATE CHILD cannot be designated as a beneficiary in an association under a statute limiting the beneficiaries to the husband, wife, children, and relatives of a member. (p. 460.)

BENEFIT SOCIETY—DEPENDENCY OF BENEFICIARY.—THE ILLEGITIMATE CHILD of a man, to whose support he contributes nothing except in the sense that he pays his own board to its mother, is not "dependent" upon him so that he can name it as his beneficiary in a benefit association. (pp. 460, 461.)

Contract brought by the sister and executrix of Alexander Lavigne to recover six hundred and eighty dollars as a mortuary benefit. There was a judgment for the plaintiff and the claimant appealed.

L. E. Wood, for the claimant.

H. A. Dubuque, for the plaintiff.

²⁷ **MORTON, J.** At the time of his death the plaintiff's testator was a member in good standing of the defendant corporation, which is a beneficiary association. The association admits that it has in its hands six hundred and eighty dollars as mortuary benefits of the deceased, and is ready to pay it to the plaintiff or the claimant as the court may decide. There are no other claimants. Marilda Chasse, the claimant, is the illegitimate child of the testator. The plaintiff ²⁸ is the testator's sister and is executrix of this will, which has been duly proved and allowed.* By this will he left to his sister the bene-

fits coming to him from the association. He also made her residuary legatee. Afterward, by an instrument in writing, he designated said Marilda Chasse as the beneficiary entitled to all mortuary or other benefits coming to him or his beneficiary from the association, describing her in the instrument as his natural child, and alleging that the designation was made in recognition of his moral duty to support her. He never contributed to her support except in the sense in which he did so by paying his board, when able, to her mother, with whom he boarded. The mother kept other boarders and took in washing. The plaintiff paid his dues to the defendant society and advanced him money for his board, medical care and attendance; without such assistance on her part his membership in the society during the last year of his life would have lapsed, and he would have lost the sick benefits which he received and the mortuary benefits at his death, for which this action has been brought. The question is, whether the said Marilda Chasse was or could be legally designated as the beneficiary in accordance with article 28 of the by-laws of the association, that the "widow or other legal beneficiary of a deceased member shall be entitled," etc., and the statutes applicable to such associations.

This association was organized under the Statutes of 1888, chapter 429. By section 8 of that statute the beneficiaries were limited to "the husband, wife, children, relatives of, or persons dependent upon such member." The statute has since been extended so as to include affianced husband and affianced wife (Stats. 1890, c. 341, sec. 1; Stats. 1894, c. 367, sec. 8), and child by legal adoption and parent by legal adoption (Stats. 1898, c. 474, sec. 11; Stats. 1899, c. 442, sec. 11), but the other beneficiaries remain the same. No one outside of the classes thus named can be a beneficiary: *Brierly v. Equitable Aid Union*, 170 Mass. 218, 64 Am. St. Rep. 297, 48 N. E. 1090; *American Legion of Honor v. Perry*, 140 Mass. 580, 5 N. E. 634. Is the claimant a child of, or a relative of, or a person dependent upon the deceased member within the meaning of the statute? By "children," as that word is used in the statute, is meant, we think, legitimate children: *Kent v. Barker*, 2 Gray, 535; *Jarman on Wills*, 6th Am. ed., 1076. The word "relatives" is of a broader scope, but manifestly cannot be held to include an illegitimate child: *Esty v. Clark*, 101 Mass. 36, 3 Am. Rep. 320, *Kimball v. Story*, 108 Mass. 382; *Elliot v. Fessenden*, 83 Me. 197, 22 Atl. 115. The attempted

designation of the claimant as a beneficiary must be regarded, therefore, as invalid.

Neither do we think that within any fair construction of the words she can be considered a dependent upon him. He contributed no more to her support than any one of the other boarders whom her mother took, and, as matters stood, he was under no legal obligation to support her. In no just sense can there be said to have been directly or indirectly a relation of dependency between the child and its putative father: See *McCarthy v. New England Order of Protection*, 153 Mass. 314, 25 Am. St. Rep. 637, 26 N. E. 866; *Elsley v. Odd Fellows' Relief Assn.*, 142 Mass. 224, 7 N. E. 844.

The association admits that either the plaintiff or the claimant is entitled to the fund. For the reasons which have been given we think that the claimant is not entitled to it. It follows that the plaintiff is entitled to it.

Judgment affirmed.

Benefit Society—Beneficiaries.—Generally speaking, one may insure his life in favor of anyone whose interest he desires to promote: *Union Fraternal League v. Walton*, 109 Ga. 1, 77 Am. St. Rep. 350, 84 S. E. 317. But no person not one of the class for whose benefit a mutual association is authorized can be a beneficiary: See the monographic notes to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 560; *Bankers' etc. Assn. v. Sapp*, 19 Am. St. Rep. 786. To constitute dependency, a beneficiary must be dependent upon a member in a material degree for support: *McCarthy v. Supreme Lodge etc.*, 153 Mass. 314, 25 Am. St. Rep. 637, 26 N. E. 866.

Illegitimates.—The word "children" as used in a statute does not include illegitimates: *Alabama etc. Ry. Co. v. Williams*, 78 Miss. 209, 84 Am. St. Rep. 624, 28 South. 853; *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185, 43 N. E. 447. Under a civil damage act giving an action to one dependent on the deceased, one claiming as a child must show his legitimacy: *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799.

LEWIS v. METROPOLITAN LIFE INSURANCE CO.

[178 Mass. 52, 59 N. E. 439.]

LIFE INSURANCE—WHO MAY RECOVER.—Under a contract of insurance authorizing the payment of the amount of the policy to any relative or connection of the insured, or to one incurring expense in his behalf, one to whom such payment might be made, but who is not named as beneficiary, cannot enforce the policy. Such suit can be maintained only by the executor or administrator of the insured. (p. 463.)

LIFE INSURANCE.—THE FACT THAT ONE PAYS THE PREMIUMS on the life insurance policy of another does not entitle him to sue thereon. Such premiums are, in legal contemplation, paid by the insured. (p. 463.)

Contract on a life insurance policy brought by the son of the insured. The policy was an endowment policy, and provided that in case of the "death of the insured, the company may pay the amount due under this policy to any relative by blood or connection by marriage of the insured, or to any other person appearing to such company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured or for his or her burial." The plaintiff offered in evidence the policy and the proof of the death of the insured. The defendant admitted that the proofs were in due form, but denied that they related to the party insured. The plaintiff testified that he had paid the premiums on the policy, had supported the insured for several years, and had paid her funeral expenses; and that he always supposed the policy was issued on his mother's life, and had only recently been informed that the defendant had taken the ground that a different person had impersonated his mother, and that the policy had thereby been fraudulently issued. The court directed a verdict for the defendant, and the plaintiff alleged exceptions.

E. H. Savary, for the plaintiff.

G. W. Cox, for the defendant.

⁵⁴ **LORING, J.** The plaintiff had no rights under the policy sued on by him. The insured was his mother, Esther Lewis. The promise sought to be enforced in this action was a promise "to pay . . . the amount stipulated in the schedule below," without naming anyone as the person to whom the payment was to be made. Under the clause authorizing the company to

pay this sum to "any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial," a payment to the plaintiff might perhaps have been a discharge of the contract (*Metropolitan Ins. Co. v. Schaffer*, 50 N. J. L. 72, 11 Atl. 154), but that clause does not entitle one to whom such a payment might have been made, but who is not named as the beneficiary of the policy, or otherwise designated as the person who is to receive the sum to be paid, to enforce payment of the sum due under it. Such a suit can be maintained only by the executor or administrator of the insured with whom the contract was made: *McCarthy v. Metropolitan Ins. Co.*, 162 Mass. 254, 38 N. E. 435. Neither does the fact, testified to by the plaintiff, that he "paid the premiums between the time of the issue of the policy and the death" give the plaintiff a right to sue for the amount to be paid; the premiums being paid under the policy, are in legal contemplation paid by the insured: *Swan v. Snow*, 11 Allen, 224, 226; *Millard v. Brayton*, 177 Mass. 533, 83 Am. St. Rep. 294, 59 N. E. 436.

Exceptions overruled.

Insurance Money—Who Entitled to.—The immediate right to insurance money on the death of the insured vests in the representative, not at once in a legatee or other person entitled thereto: *Note to Newman v. Mutual Ins. Assn.*, 14 Am. St. Rep. 203. The fact that one pays the premiums on a life insurance policy does not entitle him to recover on the policy: *Millard v. Brayton*, 177 Mass. 533, 83 Am. St. Rep. 294, 59 N. E. 436.

DE FORGE v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[178 Mass. 59, 59 N. E. 669.]

EVIDENCE—X-RAY PLATES AND PICTURES.—In an action for personal injuries, where the plaintiff puts in evidence X-ray pictures of his feet designated in pencil "right" and "left," the defendant may place in evidence the plate from which the pictures were taken, and pictures printed from it by an expert, and show that the foot marked "left" in the plaintiff's pictures, which his witness had testified showed an enlargement of the bone, was in fact the uninjured right foot. The fact that the plate had on it the letters "R" and "L," placed there since the plaintiff's pictures were printed, is not ground for excluding it. (pp. 465, 466.)

EVIDENCE—PHOTOGRAPHS—DISCRETION OF JUDGE. In the introduction in evidence of X-ray plates and pictures the judge has discretion in the matter of their verification or authentication, but if this question is not involved, his exclusion of such evidence will sustain an exception. (pp. 466, 468.)

EVIDENCE—X-RAY PHOTOGRAPHS—VERIFICATION.— While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted in evidence if properly taken. (p. 467.)

JUDGE—DISCRETION OF.—In matters which may be left generally to the discretion of the trial judge, his discretion is not unlimited. He is not at liberty to disregard the rules of law, by which the rights of the parties are governed. (p. 468.)

Tort under the Statutes of 1887, chapter 270, for injuries sustained by a brakeman while employed by the defendant. There was a verdict for the plaintiff, and the defendant alleged exceptions.

J. B. Carroll and W. H. McClintock, for the plaintiff.

W. S. Robinson, for the defendant.

☞ LATHROP, J. The first question in this case is whether the notice required by the Statutes of 1887, chapter 270, section 3, was given to the defendant. The statute requires that it is to be "given to the employer." The person to whom the notice was given was the freight agent of the defendant in Springfield. He testified that he sent it to William E. Barnett, the attorney for the defendant in New Haven; that he so sent it in pursuance of general printed instructions, directing him to send such notices as pertained to Barnett's department; and that he had received such notices for five years. We do not think it necessary to determine whether it would have been enough to show merely a notice given to a freight agent or to an attorney of the defendant, but when it appeared that the practice of giving notices in this way had been going on for so long a time, without, so far as it appears, any objection being made, it might well be found that the defendant had recognized and acquiesced in the practice: ⁶¹ See McCabe v. Cambridge, 134 Mass. 484; Shea v. New York etc. R. R. Co., 173 Mass. 177, 53 N. E. 396. This exception is therefore overruled.

The remaining question relates to the exclusion of evidence offered by the defendant. As result of the accident the plaintiff's left foot was injured, and the principal inquiry at the trial was as to the extent of the injury. The plaintiff put in

evidence X-ray pictures of the plaintiff's two feet, printed from a glass plate. Each of the pictures was marked under the toes of each foot, "left" and "right," respectively, both words being in lead pencil. One of the plaintiff's witnesses explained that the representation of the foot with the word "left" below it was the left foot and represented the injured foot, and the other, marked "right," was the right foot. He then testified that there had been a dislocation of the bones upward, and that an enlargement of the bone of the foot marked "left" in the picture was, in his opinion, the result of fracture, and that the man would always have a weak foot, and would not be able to perform the duties of a freight brakeman. On cross-examination he testified, that leaving out the question of fracture, there was no reason why the plaintiff could not have a perfectly useful foot; and that leaving the pictures out, there was nothing to the eye to disclose any fracture, although he had suspicions as to a fracture.

The defendant contended and offered to show that the X-ray placed the right foot upon the right side of the plate, and the left foot upon the left side of the plate, and that in printing sensitized paper the objects would be reversed; and that, as matter of fact, the pictures showing an enlargement were pictures of the right foot instead of the left. This evidence was excluded. Immediately before this the defendant had offered the glass plate from which the plaintiff's pictures were taken, and this was excluded. Subsequently other pictures printed from the same plate were offered in evidence and were excluded.

No reason appears in the exceptions why the evidence offered by the defendant was excluded; and we can see no reason why the plate from which the pictures put in evidence by the plaintiff were printed should not have been admitted. It was produced by the photographer who made the pictures. The ground ⁶² urged by the plaintiff against its admission was that it had on it the letters "R" and "L," which had been put on since the pictures put in evidence by the plaintiff had been printed. These letters did not in any way obscure the portion of the left foot in controversy; and were certainly no more objectionable than the letters added in pencil to the plaintiff's pictures.

It is further contended by the plaintiff that there was some doubt as to the manner in which the plate was made, and that the judge might have excluded it for that reason. We see

nothing in the exceptions to substantiate this claim. If it were true, then the plaintiff's pictures should not have been admitted.

It is entirely clear from the testimony that the picture on the glass plate was not taken by a lens, but by an X-ray machine; and that it was the impression of a shadow, not a reflection of an object, the plate being below the feet and the light above them. When pictures were printed from the plate the position of the feet would be reversed; and this would have been demonstrated had the plate and the pictures taken by the defendant been admitted. The plaintiff assumed from his marking on the pictures admitted that the feet as represented on the plate were reversed, which is not in accordance with the testimony given by his own witnesses as to the manner in which the impressions on the plate were produced.

Lastly, it is asserted that the judge might have excluded in his discretion the plate and the pictures offered by the defendant. The rule is thus stated by Chief Justice Gray in *Blair v. Pelham*, 118 Mass. 420: "A plan or picture, whether made by the hand of man or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. . . . Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception." It is therefore in the matter of verification or authentication that the judge has discretion. But here there was no question of this sort. The plaintiff had put in two pictures printed from the glass plate. The defendant then offered the plate together with two other pictures made from the same plate; and the evidence of verification was stronger in the case of the defendant's ⁶³ pictures than in the case of the plaintiff's. The photographer who took the plaintiff's pictures testified that he did not know much about the X-ray; while the person who took the pictures for the defendant was a physician of high standing, who had taken, as he testified, in the neighborhood of a hundred X-ray pictures, and had seen the majority of them developed. On this evidence we do not deem it possible that the judge could have excluded the plate or the pictures on the ground that they were not duly verified. While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it

should be admitted if properly taken: *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445.

The rule laid down by Chief Justice Gray in *Blair v. Pelham*, 118 Mass. 420, is in accordance with earlier and later cases in our reports: *Hollenbeck v. Rowley*, 8 Allen, 473; *Marcy v. Barnes*, 16 Gray, 161, 163, 77 Am. Dec. 405; *Randall v. Chase*, 133 Mass. 210, 213; *Turner v. Boston etc. R. R.*, 158 Mass. 261, 265, 33 N. E. 520; *Commonwealth v. Morgan*, 159 Mass. 375, 34 N. E. 458; *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783; *Van Houten v. Morse*, 162 Mass. 414, 422, 44 Am. St. Rep. 373, 38 N. E. 705.

It is true that the opinion in *Gilbert v. West End St. Ry.*, 160 Mass. 403, 36 N. E. 60, after stating many reasons why the photograph offered in evidence in that case was properly rejected, concludes in these words: "We think at least it was in the discretion of the court to reject it," citing *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783. But the case cited was not decided on the ground that the judge had discretion except on the matter of verification; and we do not think that the court intended to lay down a broader rule than that stated in *Blair v. Pelham*, 118 Mass. 420.

It is also true that in some cases a somewhat broader rule is laid down: See *Verran v. Baird*, 150 Mass. 141, 22 N. E. 630; *Harris v. Quincy*, 171 Mass. 472, 50 N. E. 1042; *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521. An examination of the papers in these cases leaves no doubt in our minds that the cases were properly decided, whether the reasons given were in accordance with the rule laid down in *Blair v. Pelham*, 118 Mass. 420, or not.

In *Beals v. Brookline*, 174 Mass. 1, 54 N. E. 339, where photographs were admitted, it was said: "In the admission of such evidence much must be left to the discretion of the presiding justice, and we are not prepared to say that there was error in law in permitting them to be shown to the jury."

⁶⁴ But in this as in other matters, which may be left generally to the discretion of the trial judge, his discretion is not unlimited, and the judge is not at liberty to disregard the rules of law, by which the rights of the parties are governed: See *Woodward v. Leavitt*, 107 Mass. 453, 460, 9 Am. Rep. 49; *Chandler v. Jamaica Pond Aqueduct*, 122 Mass. 305.

We are of opinion that the rights of the defendant in this case were violated, and that the glass plate, the pictures taken by the defendant, and the evidence offered by the defendant

and excluded should have been admitted. It was clearly competent for the defendant to introduce evidence to show that the plaintiff's pictures showing an enlargement of one of the feet, and from which a witness for the plaintiff discovered a fracture, did not represent the left foot, but the right, and for this purpose to show the difference between an ordinary photograph and one taken by an X-ray.

As the only exception relating to the question of liability has been overruled, the new trial will be on the question of damages only.

So ordered.

Evidence—Photographs.—An X-ray photograph showing the overlapping bones of one of the legs of a plaintiff broken by an injury for which the suit is brought, taken by an expert, is admissible in evidence: See the monographic note to *Baustian v. Yeung*, 75 Am. St. Rep. 474. Whether photographs are sufficiently verified to be admissible is for the court, and is not a matter of exception: *Van Houten v. Morse*, 162 Mass. 414, 44 Am. St. Rep. 373, 38 N. E. 705.

BROWN v. BOSTON ICE COMPANY.

[178 Mass. 108, 59 N. E. 644.]

MASTER AND SERVANT.—IT IS NOT WITHIN THE SCOPE OF THE AUTHORITY of a servant, to whose custody his master's property has been confided, to undertake to secure it from future injury by chastising persons who have done damage to it in the past. (p. 470.)

MASTER AND SERVANT.—A SERVANT, IN ASSAULTING a boy to punish him for breaking his master's ax, is not acting within the scope of his employment, and the master is not liable for the assault. (p. 470.)

Two actions in tort for assaults by one Sprague. The plaintiffs were small boys. Sprague was the driver of an ice cart of the defendant. On the day of the assaults, Sprague went into a house to deliver a piece of ice, leaving a cake of ice and his ax on the sidewalk. Whereupon one of the plaintiffs picked up the ax, chopped off a bit of ice, and dropped the ax, breaking it. When Sprague returned and saw the condition of the ax, he struck the other plaintiff, who stood near the ice; and, on being told that he had the wrong boy, sought out the right one and gave him a beating. The mother of one of the boys testified that when she asked

Sprague for an explanation, he answered: "Look at this ax. I'll teach him better than to break the company's tools." And the father of the other plaintiff testified that when he asked Sprague why he struck his boy, he replied: "Because he broke the company's ax." At the close of the plaintiff's evidence the judge, at the defendant's request, ruled that there was not sufficient evidence to hold the defendant liable for the injuries inflicted by Sprague, and that Sprague at the time was not acting within the scope of his authority as a servant of the defendant. The jury, by the direction of the judge, returned a verdict for the defendant in both cases, and the plaintiff alleged exceptions.

C. Abbott, for the plaintiffs.

C. C. Mellen, for the defendant.

110 LORING, J. The ground on which the plaintiffs contend that the defendant is liable for Sprague's acts in beating them with the handle of the ice ax is that, from what Sprague said at the time, the jury were warranted in finding that he punished them in whole or in part for the purpose of making it easier for him to deliver ice from the defendant's ice cart in the future, without an assistant and with slight care of the tools, and therefore the case is brought within *Howe v. Newmarch*, 12 Allen, 49. But in this case Sprague's attack on the boys was an act of punishment inflicted for a past injury to his master's property, and not in doing an act which he had to do if he performed the duty owed by him to his master.

It is not within the scope of the authority of a servant, to whose custody his master's property has been confided, to undertake to secure it from future injury by committing the illegal act of inflicting personal chastisement on persons who have done damage to it in the past.

The case comes within *Bowler v. O'Connell*, 162 Mass. 319, 44 Am. St. Rep. 359, 38 N. E. 498, *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100, and in some aspects is like *Porter v. Chicago etc. Ry. Co.*, 41 Iowa, 358, and *Candiff v. Louisville etc. Ry. Co.*, 42 La. Ann. 477, 7 South. 601.

Exceptions overruled.

Master's Liability for Servant's Acts.—The rule as to the liability of a master for the acts of his servant is, that if the act is done without the authority of the master and not for the purpose of

executing his orders or doing his work, then he is not responsible, but if it is done in the execution of the authority given by the master and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful: *McCarthy v. Timmins*, 178 Mass. 378, post, p. 490, 59 N. E. 1038. As to when a servant is within the scope of his authority and when not, within the meaning of this rule, see the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93; *McDermott v. American Brew. Co.*, 105 La. Ann. 124, 83 Am. St. Rep. 225, 29 South. 498; *Canton etc. Co. v. Pool*, 78 Miss. 147, 94 Am. St. Rep. 620, 28 South. 823; *Guille v. Campbell*, 200 Pa. St. 119, post, p. 705, 49 Atl. 988.

HEALEY v. LOTHROP.

[178 Mass. 151, 59 N. E. 653.]

ASSAULT BY POLICE OFFICER—LIABILITY OF PROPRIETOR.—A special police officer appointed on the application of the proprietor of a place of amusement is not the servant of the proprietor, and if he commits an assault, the only remedy against the proprietor is on his bond. (p. 472.)

Tort against the keeper of a place of amusement for an assault and battery committed by one Mead, a special police officer. The acts of the officer were without the direction or knowledge of the defendant. He was appointed in pursuance of a statute hereinafter set forth, upon the application of the defendant, to serve without pay from the city. The defendant gave a bond to the city as required by the statute. At a previous stage of the case it was before the supreme court, and is reported in 171 Mass. 263. From the decision then rendered, it appears that the only question raised was whether the officer was the servant of the defendant. It was held that he was not. Holmes, J., in delivering the opinion of the court, said: "The case depends upon the construction of Statutes of 1878, chapter 244, section 6. That section required the defendant to give bond to the city treasurer 'to be liable to parties aggrieved by any official misconduct of such police officer, to the same extent as for the torts of agents and servants in their employment.' It continues: 'And proceedings may be had upon said bonds in the same manner as upon the bonds of constables.' If the statute had meant to make the officer the servant of the person who applies for his appointment and gives bond for his conduct, presumably it would have said so. But if it had said so, it would have insisted upon a fiction being

treated as a fact. It is true that the defendant asked to have an officer appointed—perhaps asked to have Mead appointed—and that he paid him. But he did not appoint him, could not remove him, and could not control his official conduct, which was governed by the regulations of the police commissioners and his own sense of duty as a public officer. The statute does not call the relation that of master and servant, and goes no further than to make the defendant liable upon his bond 'to the same extent' as for a servant. The words quoted imply that the officer is not one. They mean to the same extent as in another case which does not exist." After this decision the plaintiff amended his declaration. At a new trial the jury, by the direction of the judge, returned a verdict for the defendant, and the plaintiff alleged exceptions.

A. M. Pinkham and E. Lowe, for the plaintiff.

C. F. Eldredge, for the defendant.

¹⁵² HOLMES, C. J. This is an action of tort against the keeper of a place of amusement in Boston, seeking to make him liable for alleged official misconduct of a special police officer upon his premises. The first count is for an assault and battery on the plaintiff, treating the special policeman as the defendant's servant. That was disposed of when this case was here before: *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540. There was no evidence put in or offered which tended to show that the officer was acting as the defendant's servant apart from the statute. After the decision by this court the plaintiff added another count, setting forth the appointment of the special police officer on the defendant's written application and bond (under Stats. 1878, c. 244, sec. 6, now repealed, Stats. 1898, c. 282, sec. 4), and alleging an assault and battery by the officer while in the discharge of his duties in the defendant's theater. In other words, the plaintiff attempted to evade the former decision by a slight change in the words of his declaration, and by suggesting that although the police officer was not the defendant's servant, the defendant was liable for his official misconduct to the same extent as if he were. The scope of our decision was wider, and disposes of the new count as well as of the old one. The only remedy against the defendant for the misconduct as such is on his bond. Whether or not it is necessary to get a judgment against the police officer before proceeding upon the bond, as

in the case of a Boston constable (Stats. 1814, c. 165; *Calder v. Haynes*, 7 Allen, 387), there is no such necessity for a judgment against the defendant, and, as we once before have decided, there is no ground for a judgment against him in the act: Stats. 1878, c. 244, sec. 6.

Exceptions overruled.

A Theater Manager is Liable for the Act of His Servant in wrongfully attacking and injuring a patron of the theater, though the servant is a special policeman: *Dickson v. Waldron*, 185 Ind. 507, 41 Am. St. Rep. 440, 84 N. E. 506, 35 N. E. 1.

EMERY v. BOSTON TERMINAL COMPANY.

[178 Mass. 172, 59 N. E. 763.]

EMINENT DOMAIN.—IF A LESSEE, in an action for damages for the taking of the premises under the power of eminent domain, offers to show an oral extension of his lease, the respondent may take advantage of the statute of frauds without pleading it. (p. 473.)

IF A LEASE IS MADE IN PAROL, A SUBSEQUENT MEMORANDUM written after the lessor parted with his title can have no effect as against a stranger. (p. 473.)

STATUTE OF FRAUDS.—WHILE A SUBSEQUENT MEMORANDUM or act satisfying the statute of frauds may relate to the date of the oral agreement so far as the parties are concerned, it does not retroact so as to affect third persons. (p. 474.)

EMINENT DOMAIN.—A TITLE FOUNDED UPON a taking by the right of eminent domain is a new title. (p. 475.)

EMINENT DOMAIN—VALUE OF LEASE.—The fact that a lessor was in the habit of renewing the lease, and that he and the lessee were likely to keep on together, adds nothing to the legal rights of the lessee. Hence expert evidence as to an increase of the value of the lease from this source is properly excluded, in an action by the lessee for damages for the taking of the premises by right of eminent domain. (p. 476.)

EMINENT DOMAIN — ELEMENTS OF DAMAGE TO LESSEE.—Where a statute gives an owner three months to vacate premises taken for a public use, his lessee, whose lease does not expire until after such period, cannot recover for an interruption of his business by having to move, or for the expense of moving, or for a loss of fixtures, except as caused by having to move at an earlier day than the expiration of the lease. (p. 477.)

L. M. Friedman, for the petitioners.

P. H. Cooney, for the respondent.

¹⁸² **HOLMES, C. J.** This is a petition for the assessment of damages caused by the taking of Hobbs wharf in Boston un-

der the right of eminent domain. The taking was on January 5, 1897. At that time the petitioners were in under a written lease which had been extended to May 1, 1897. The other parties interested have been settled with and there is no question about them. The petitioners offered to show an oral agreement extending their lease for a year more, made before January 5th, and a written memorandum of the same made after that date. These were excluded by the court, and the petitioners excepted. The petitioners also excepted to the exclusion of an agreement under seal, made before the taking, between the owners of the wharf and the respondent, by which the owners covenanted to convey the premises on or before a certain date, free of encumbrances except a lease "expiring May 1, 1897, with privilege to the lessee of one additional year from that date," and by which the parties agreed that if the property was taken by right of eminent domain before the conveyance, the price fixed should be the damages paid. Other exceptions will be mentioned later.

We think it quite plain, notwithstanding the acute argument for the petitioners, that the exclusion of the foregoing evidence was right: Pub. Stats., c. 120, sec. 3.

To begin with the question of pleading, it was not necessary for the respondent to plead the statute. It was a stranger to the petitioners' title, and, when the petitioners alleged that they had a good one, had a right to call on them to prove it without undertaking to specify in what respect it might turn out bad. A remote and imperfect analogy may be found in the rule that a stranger need not make profert of a deed: Sheppard's Touchstone of Common Assurances, 73. Moreover, the petition itself sets out the facts, and would have ¹⁸⁹⁸ been demurrable but for the admitted interest of the petitioners up to May 1, 1897: Ahrend v. Odiorne, 118 Mass. 261, 268, 19 Am. Rep. 449.

In the next place, the operation of the statute is not confined to privies, but the respondent can rely upon it. The natural interpretation of the words of Public Statutes, chapter 120, section 3, is that the writing required for the creation of an interest in land is more than a memorandum of the constituent act, that it is itself the constituent act. It seems to us clear that the writing must have a part at least in the creation of the estate. But if a different construction should be adopted in view of the history of the section and upon a

comparison with Public Statutes, chapter 78, section 1, the result would not be changed.

At the date of the taking the petitioners had no more estate beyond May 1st, as against the respondent, than they had as against the owners of the wharf. To that extent, at least, the words of the act are explicit. The statute here is not dealing with promises, in which case it naturally would be directed only to the rights of the parties to a contract, but with estates, which are interests in rem, good against all the world. It therefore is dealing with the rights of all the world, and when it says that an estate created without writing shall have the effect of an estate at will only, it affects the reciprocal rights of the tenant and of anyone else who may be concerned in the nature of that estate.

The petitioners, having had no estate beyond May 1st at the date of the taking, could not get one by the retroaction of a letter from the former owners, who were strangers to the land at the time when it was written. It seems to be settled in England, with regard to sales of chattels under the seventeenth section of the statute of frauds (Pub. Stats., c. 78, sec. 5), that the memorandum does not retroact so as to affect third persons: *Morgan v. Sykes*, stated in *Coats v. Chaplin*, 3 Q. B. 483, 486; *Stockdale v. Dunlop*, 6 Mees. & W. 224, 233; *Felthouse v. Bindley*, 11 Com. B., N. S. 869, 877; *Benjamin on Sales*, 7th Am. ed., sec. 40a, note m. See *Marsh v. Hyde*, 3 Gray, 331, 333; *Bird v. Munroe*, 66 Me. 337, 343, 22 Am. Rep. 571. In *Leadley v. McRoberts*, 13 Ont. App. 378, 383, where it is said that an act satisfying the statute relates back to the date of the oral contract, the judge is speaking of the effect as between the parties—a matter which we need ¹⁸⁴ not consider. A similar principle to that which we adopt is familiar in regard to ratification: *Whiting v. Massachusetts Ins. Co.*, 129 Mass. 240, 241, 37 Am. Rep. 317.

The case of *Gardner v. Rowe*, 2 Sim. & St. 346, 5 Russ. 258, relied on by the petitioners, is not inconsistent with our decision. That was the case of a trust declared by a bankrupt after the bankruptcy. Assignees in bankruptcy are successors per universitatem, and stand in the shoes of the bankrupt: *Chipman v. Manufacturers' Nat. Bank*, 156 Mass. 147, 149, 30 N. E. 610; *Phosphate Sewage Co. v. Molleson*, 5 Ct. of Sess. Cas., 4th series, 1125, 1138. Property held in trust does not pass to them: *Gardner v. Rowe*, 2 Sim. & St. 346, 5 Russ. 262; *Low v. Welch*, 139 Mass. 33, 29 N. E. 216. And

as was observed in argument (*Gardner v. Rowe*, 2 Sim. & St. 348), the statute of frauds did not require trusts to be created by writing but only to be proved by it. So, when the only change since the beginning of the alleged trust is the death of the cestui que trust, it may be that the trustee still can make a declaration which will be effectual as to the interests of the heirs and widow: *Ambrose v. Ambrose*, 1 P. Wms. 321. But the cases of *Gardner v. Rowe*, 2 Sim. & St. 346, 5 Russ. 258, and *Ambrose v. Ambrose*, 1 P. Wms. 321, are inapplicable to the case of an instrument which is more than a memorandum. They also are inapplicable to a case where the person to be affected comes in not in privity, but by a new, adverse, and paramount title. Even a disseisor takes free of trusts, at least by the old law: *Chudleigh's Case*, 1 Coke, 120, 122a; *Lewin on Trusts*, 10th ed., 9, 10, 13. The prevailing opinion seems to be that a tax title is a new title, and not merely the sum of all old titles: *Hefner v. Northwestern Ins. Co.*, 123 U. S. 747, 751, 8 Sup. Ct. Rep. 337; *Brewer v. District of Columbia*, 5 Mackay, 274, 278; *McQuity v. Doudna*, 101 Iowa, 144, 146, 70 N. W. 99; *Textor v. Shipley*, 86 Md. 424, 438, 38 Atl. 932. See *Harrison v. Dolan*, 172 Mass. 395, 398, 52 N. E. 513. And if there is such a thing as a new title known to the law, one founded upon a taking by the right of eminent domain is as clear an example as can be found: See *Williams on Personal Property*, 15th ed., 46.

It very properly was not argued that the reference to the tenants' supposed rights in the agreement between the owners and the respondent satisfied Public Statutes, chapter 120, section 3. We need not go into the reasons further than we have done at the beginning of our discussion. *Shippey v. Derison*, 5 Esp. 190, seems to have ¹⁸⁵ been a suit on a contract to take a lease, and so only to have involved the fourth section of the statute of frauds: Pub. Stats., c. 78, sec. 1.

It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be

taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase in value from that source: *King v. Liverpool etc. Ry. Co.*, 6 Nev. & M. 186, 191, 4 Ad. & E. 650. Under our statutes we are not prepared to follow: *Mayor etc. of Baltimore v. Rice*, 73 Md. 307, 21 Atl. 181. For as under the statutes the land was to be valued as a whole and then the amount subdivided (Stats. 1896, c. 516, sec. 23; Pub. Stats., c. 112, secs. 95, 100, 107, c. 49, secs. 18, 22, 25), the view opposite to ours would allow the tenants to diminish the share of the land owners on the strength of the latter having entertained an intention which they were free to change if they chose: See *Phyfe v. Wardell*, 5 Paige, 268, 279, 28 Am. Dec. 430. This consideration loses none of its force in determining the principle to be adopted merely because the landlords happened to have made an improvident bargain with the respondent in the particular case—a matter with which the petitioners had nothing to do.

An exception was taken to the refusal of a ruling that the petitioners were entitled to recover of the respondent a sum to compensate them for injury to their business, the loss of the earnings and profits, for the period that the business was temporarily suspended or interrupted by removing from their old place to another location. The judge was right. It appears from ¹⁸⁶ what we have said that the petitioners had no rights in the land as against the respondent after May 1st. At that date they would have had to leave the premises and could have recovered nothing for being forced to do so: *Emerson v. Somerville*, 166 Mass. 115, 118, 44 N. E. 110. For this, if for no other reason, they were entitled to recover nothing for interruption of their business by reason of having to move. The same principle applies to a claim for the expenses of removing the petitioners' property to their new place of business.

The last exception argued was to a refusal to rule that the petitioners were entitled to recover "for the loss of the tenant fixtures which were taken from them, together with damages for any depreciation in those . . . which they were able to remove." All that is necessary to add with regard to this is

that by the statute the respondent had to allow the petitioners three months for removing after taking the land: Stats. 1896, c. 516, sec. 24. That took them to April 5th. Any damage caused by having to leave on that date rather than on May 1st the judge allowed the jury to give. That was as favorable an instruction as the petitioners were entitled to ask.

Exceptions overruled.

Pleading the Statute of Frauds is considered in the monographic note to *Jordan v. Greensboro Furnace Co.*, 78 Am. St. Rep. 648-658.

Parol Leases are discussed in the monographic note to *Wallace v. Scoggins*, 17 Am. St. Rep. 752-757. Consult, also, the recent cases of *Laroussini v. Werlein*, 52 La. Ann. 424, 78 Am. St. Rep. 350, 27 South. 89; *Gladwell v. Holcomb*, 60 Ohio St. 427, 71 Am. St. Rep. 724, 54 N. E. 473.

Statute of Frauds—Memorandum.—A verbal contract may be taken out of the operation of the statute of frauds by a subsequent execution thereof in writing: *Sheehy v. Fulton*, 38 Neb. 691, 41 Am. St. Rep. 767, 57 N. W. 395. Written evidence of a contract need not be contemporaneous with the contract. A written admission of a previous verbal contract suffices: *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698. A memorandum of a verbal contract made after a breach of the contract but before an action is brought for the breach satisfies the statute: *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571.

Eminent Domain.—In estimating the damages to a leasehold from the exercise of eminent domain, the probability of a renewal of the plaintiff's lease may be considered, where the evidence shows that this circumstance increases its market value: See the monographic note to *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 296.

BOSTON WOVEN HOSE AND RUBBER COMPANY v. KENDALL.

[178 Mass. 232, 59 N. E. 657.]

DAMAGES—INTERVENING TORT.—IF A FIRST-CLASS BOILER-MAKER makes a boiler for a manufacturer to be used for certain purposes, and delivers it with a patent defect, he is liable to the manufacturer for the damages paid by the latter to his employés for injuries resulting from the defect, although the manufacturer was negligent in using the machine without inspection. (pp. 479, 480.)

DAMAGES—LETTERS PATENT AS EVIDENCE.—In an action against the maker of a boiler for damages arising from a defect therein, letters patent of a process of manufacturing in which the boiler was to be used are admissible in evidence as a foundation for testimony of the patentee that he notified the defendant of the use for which the boiler was wanted. (pp. 480, 481.)

DAMAGES — EVIDENCE OF SUBSEQUENT EXPERIMENTS.—In an action for damages from an explosion alleged to be due to a defective hinge to a boiler door, it may be shown that experiments two or three months later with a similar boiler, except the hinge, did not result in an explosion. (p. 481.)

C. Reno, for the plaintiff.

A. Hemenway and H. S. MacPherson, for the defendants.

²³⁵ **HOLMES, C. J.** This is an action to recover damages which the plaintiff had to pay to its employes for personal injuries caused by an explosion of a boiler made by the defendants. The facts may be stated in a few words. The defendants, who were first-class boiler-makers, undertook to make for the plaintiff a boiler which would stand a working pressure of one hundred pounds, and, on the plaintiff's testimony, understood that the boiler was to be used to contain naphtha vapor for experiments in devulcanizing india rubber. An experiment was tried, and, at a pressure of less than one hundred pounds, the naphtha vapor blew out the packing between the door and the end of the boiler by the side of the hinge, escaped into the air, ignited, and caused ²³⁶ the damage for which the plaintiff had to pay. According to the plaintiff's evidence, the accident was due to an improper construction of the hinge, which, by not having play enough, prevented that part of the door which was nearest to it from being pressed close to the boiler end by clamps which were used for that purpose.

At the trial the defendants asked many rulings and took many exceptions, but in the main they are condensed by the present argument in the general proposition that inasmuch as the plaintiff could not have been compelled to pay its workmen except on the ground that it had been wanting in due care, it cannot hold the defendants answerable for what would not have happened if the plaintiff had done its duty. The case is treated by the defendants' counsel as if it stood on the same footing as one where a plaintiff seeks to recover for personal injuries to himself to which his own negligence has contributed. But the judge allowed the plaintiff to recover a verdict on proving, as it did, to the satisfaction of the jury that it was liable for the damages which it paid, and also that although negligent as toward its servants it had shown all the care which the defendants had a right to expect.

We are fully aware of the difficulties in the way of holding a person liable for damage when the tort of another has intervened between his act and the result complained of: Glynn

v. Central R. R., 175 Mass. 510, 511, 78 Am. St. Rep. 507, 56 N. E. 698, and cases cited. Nevertheless, it is held by our decisions that in some cases of that sort there may be a recovery, and this seems to be recognized in the case upon which the defendants chiefly rely: Nashua etc. Steel Co. v. Worcester etc. R. R. Co., 62 N. H. 159. The defendants, to bring themselves within the distinctions there taken, insist that we must assume that the plaintiff here might have prevented the accident by ordinary care, because it must have been held liable on the ground of a want of such care, and that, in such a case at least, it cannot make the defendants indemnify it.

We are of opinion that the plaintiff is entitled to hold its verdict, and that if indemnity ever is to be recovered, short of an express contract of insurance, for what is in form the result of a tort on the plaintiff's part, this case belongs to the class in which ²³⁷ it should be allowed. The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it and probably not falling within the exceptional rule as to well-known articles made by reputable makers and sold in the market ready for use: Shea v. Wellington, 163 Mass. 364, 369, 40 N. E. 173. Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty or representations of the defendants. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendants' judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract, the consequences which ensued must be taken to have been contemplated, and was not too remote.

The fact that the reliance was not justified as toward the men does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good: See Stats. 1894, c. 522, sec. 29. The New Hampshire decision is not against it, and there is an English case which went to the court of appeal which is very much in point: Mowbray v. Merryweather (1895), 1 Q. B. 857 (1895), 2 Q. B. 640. It is intimated in that case that the workman himself could have

recovered in the first place against the defendant. Whether that is a necessary condition of a recovery over we need not consider: See *Holyoke v. Hadley Co.*, 174 Mass. 424, 54 N. E. 889; *Consolidated etc. Lasting Machine Co. v. Bradley*, 171 Mass. 127, 134, 68 Am. St. Rep. 409, 50 N. E. 464. There are many cases in our own and other reports which offer as strong or stronger applications of the principle of liability over: *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355; *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191; *Old Colony R. R. Co. v. Slavens*, 148 Mass. 363, 12 Am. St. Rep. 558, 19 N. E. 372; *Holyoke v. Hadley Co.*, 174 Mass. 424, 54 N. E. 889; *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 327, 328, 16 Sup. Ct. Rep. 564; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987.

Two exceptions were taken to the admission of evidence. The first was to the admission of a patent for a process of devulcanizing ²³⁸ india rubber by hot naphtha vapor under pressure, granted to Dr. Clark, for whose experiments the boiler was ordered. This laid a foundation for Clark's testimony that he notified the defendants of the use for which the boiler was wanted. The other exception was to letting in testimony that experiments two or three months later with a similar machine, and with all conditions similar except the hinge, did not result in an explosion. Evidence to the same point already had been let in before the exception was taken, and even if an exception properly were open we should hesitate to sustain it, considering that the result in some degree tended to confirm the theory that the construction of the hinge caused the trouble.

Exceptions overruled.

One Compelled to Pay Damages occasioned by the negligence of another is entitled, if without fault, to indemnity from the latter: *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987; *Old Colony R. R. v. Slavens*, 148 Mass. 363, 12 Am. St. Rep. 558, 9 N. E. 372. See, in this connection, the monographic note to *Village of Carterville v. Cook*, 16 Am. St. Rep. 250-257.

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ODDY v. WEST END STREET RAILWAY COMPANY.

[178 Mass. 341, 59 N. E. 1028.]

STREET RAILWAY—INJURY FROM PASSING VEHICLE. Street-car companies are not negligent in not providing a means of warning passengers about to leave a car of the danger of colliding with other vehicles. The risk of being hurt by such vehicles is the risk of the passenger. The danger is not one against which the carrier is bound to protect the passenger or to give him warning. (p. 484.)

H. E. Bolles, for the plaintiffs.

M. F. Dickinson, Jr., and W. B. Farr, for the defendant.

³⁴⁶ BARKER, J. These actions are on account of injuries received by a passenger as she was leaving a street-car by her coming into collision with a hose-cart rapidly passing in the street. The car was upon one of two parallel sets of tracks and its rear platform was furnished with gates, the one on the side next the other track being closed. The car stopped to receive and deliver passengers only at designated points. After it had passed the last stopping place before that at which the passenger intended to ³⁴⁷ leave, the conductor opened the door from the rear platform, put his head into the car, and called out the name of the next stopping place. The passenger thereupon gave him a signal which indicated that she wished to leave the car at the stopping place the name of which had just been called, and saw that the conductor appreciated her signal.

Presently the car slowed up and stopped. As it was slowing up the plaintiff rose from her seat and walked to the rear door, reaching the platform as the car came to a standstill, and then going down the steps and placing herself in the street, either stepping into the wheel of a rapidly passing hose-cart, as one eyewitness who was also a passenger upon the car testified, or being struck by the hose-cart as she was leaving the car. The car had not in fact arrived at the stopping place the name of which had been called by the conductor, nor was it in fact stopped in consequence of any order or signal given by the conductor, nor for the purpose of delivering or receiving passengers, but was stopped by the motorman because he saw approaching a fire-engine and a hose-cart, which were being run to a fire, and were coming toward

the car at a high rate of speed in the direction opposite to that in which the car was moving. This stoppage was in accordance with a reasonable practice, in order to avoid collisions between moving cars and fire apparatus driven at high rates of speed. In this instance the hose-cart approached upon the same tracks on which the car was. When near the car the hose-cart turned to the left and came very near the car. The fire-engine passed first, upon the other side, but with a very short interval of time. When the car began to slow up the conductor, being on the rear platform, ascertained that the fire apparatus was approaching. He looked over the closed gate and saw the engine pass, and he continued to look in the same direction to ascertain when the hose-cart should have passed. He did not see the passenger as she came from the car to the platform, nor until his attention was called to the other side by the passing of the hose-cart, when he saw her on the ground. The passenger did not know that there was an alarm of fire, or that fire apparatus was approaching, and the jury might infer that when she rose as the car was slowing up she supposed that it was preparing to stop at the stopping place the name of which had been ³⁴⁸ called out. She testified that she heard the sound of a gong as she was getting up and walking toward the platform, but that she thought it was a car coming in the opposite direction, and that she had never before been on a car when it stopped to let fire apparatus go by. The time was 8 o'clock of the evening of January 7, 1897. The passenger was fifty-two years of age, and there is no contention that she was not in full possession of her mental and bodily powers.

At the close of the evidence Mr. Justice Blodgett ordered verdicts for the defendant, counsel agreeing that if this court should hold that the plaintiffs were entitled to go to the jury, judgment should be entered for the passenger in the sum of two thousand four hundred dollars without costs, and for her husband in the sum of one hundred dollars without costs. The cases are here upon the report of the presiding justice, which purports to state all of the material testimony. The passenger herself testified that the car had come to a stop before she reached the platform; that after she got to the platform she was giving her whole attention to getting off the car; that she was looking right ahead and did not see anything in the street; that she thought she took pains to find out whether anything was coming to the right or to the left on the street;

that she did not know that she looked both ways or that she turned her head, but that she could see a little to the right and a little to the left without turning her head, and that she was looking to see her way clear to get out of the car and thought it was clear. She was familiar with the street on which the car was, and had lived in the neighborhood eight years before, and she testified that the buildings on the street opposite the place of the accident were about the same at the time of the accident as eight years before. She further testified that she did not remember how dark it was, and that she did not think it was so dark that a person standing on the front of the car could not have seen an approaching horse wagon perfectly well.

We are of opinion that it would not be competent to find the defendant guilty of negligence upon the evidence. It was right for the motorman to stop the car where he did upon the approach of the fire apparatus. It is not customary or necessary to notify passengers of the cause of a stoppage occasioned by an obstruction ³⁴⁹ in the street. The conductor, while bound to give the passenger an opportunity to leave at the stopping place which she had indicated to him as the point where she wished her journey to end, was not obliged to inform her that that place had not been reached, unless he knew that she was attempting to leave under a misapprehension, and it was his duty to attend to the very things to which he was attending—namely, to ascertain when the obstruction to the progress of the car should cease by the passing of the approaching fire apparatus.

Street-car companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or of being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger, and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning.

The cases relied upon by the plaintiffs are none of them cases in which the danger encountered by the passenger upon leaving a street-car was merely that of collision with some vehicle not owned or controlled by the carrier and lawfully using the street. In *Bigelow v. West End St. Ry. Co.*, 161 Mass. 393, 37 N. E. 367, the danger was from an excavation or depression at the stopping place, as was the case also in *Richmond City*

Ry. Co. v. Scott, 86 Va. 902, 11 S. E. 404. Floytrup v. Boston etc. R. R. Co., 163 Mass. 152, 39 N. E. 797, was the case of a passenger upon a steam railroad having its own roadbed and passenger stations; and so was Treat v. Boston etc. R. R. Co., 131 Mass. 371. In Fleck v. Union Ry. Co., 134 Mass. 480, the passenger was jolted and thrown off from a slippery platform. Carland v. Young, 119 Mass. 150, and Murphy v. Armstrong Transfer Co., 167 Mass. 199, 45 N. E. 93, were the usual cases of foot travelers crossing streets upon which ordinary teams were approaching, the foot traveler being struck after he had gone some distance, and not stepping into the wheel from the curbing or colliding with the vehicle before he had both feet in the street.

In Maverick v. Eighth Avenue R. R. Co., 36 N. Y. 378, the passenger struck by a ladder on a hook and ladder carriage running to a fire was still upon the platform of the street-car, and was ³⁵⁰ being hurried from the car by the conductor with his hands upon her shoulders: See Chicago West Division Ry. Co. v. Mills, 91 Ill. 39, 42, where it is said that "passengers, as a matter of prudence, before attempting to get off, should know that the stoppage was for the purpose of letting them get off." See, also, Augusta Ry. Co. v. Glover, 92 Ga. 132, 147, 18 S. E. 406, for a statement that "no duty touching the selection of a safe place for landing passengers is operative on any stop made on account of an obstruction upon the track."

Judgments for the defendant on the verdicts.

One Who Alights from a Street-car in which he has been riding and steps in front of another car going in an opposite direction cannot be regarded as having exercised due care, when it does not appear that he looked to see whether any car was approaching or paid any attention to warnings given him: Creamer v. West End St. Ry. Co., 156 Mass. 320, 32 Am. St. Rep. 456, 31 N. E. 391; Buzby v. Philadelphia Traction Co., 126 Pa. St. 559, 12 Am. St. Rep. 919, 17 Atl. 895.

WISHART v. McKNIGHT.

[178 Mass. 356, 59 N. E. 1028.]

ADVERSE POSSESSION—TACKING.—Where possession has been actually, and in each instance, transferred by the one in possession to his successor, the owner of the record title is barred from recovering the land after the lapse of the period of limitation. (p. 487.)

ADVERSE POSSESSION — CONTINUITY — TACKING.—Where possession of land has been held for the statutory period by successive disseisors or trespassers, the defense of the statute is not made out if the possession has not been continuous. (p. 487.)

ADVERSE POSSESSION OF LAND NOT COVERED BY DEED—TACKING.—Successive grantors can transfer their possession of a strip of land not included in the description in the deeds, but successively and continuously occupied as part of the premises, and by such possession a title by limitation may be acquired. (pp. 487, 489.)

Writ of entry to recover a strip of land. There was judgment for the demandant, and the tenant alleged exceptions.

J. W. Corcoran, W. B. Sullivan, and A. G. Buttrick, for the tenant.

H. Parker and H. H. Fuller, for the demandant.

359 LORING, J. It appears from the photograph and plan made a part of the bill of exceptions that the demanded premises consist of a strip of land ten feet wide between the dwelling-houses of the demandant and of the tenant, running from Pond Court, on which those houses front, to the rear line of the lots; that the rear of the locus is covered by a barn, used and occupied by the tenant, which is in part on the locus and in part on the land to which the tenant, without question, has a good title; and further, that the tenant's only access by wagon to the barn is over the locus, his dwelling-house being within three and a half feet of the other—that is, the westerly—side line of his lot. From the deeds put in evidence, it appeared that the record title to the locus was in the demandant. The tenant introduced in evidence various deeds covering the land on which his dwelling-house stands, but not covering the ten foot strip in question, the first of these deeds being dated January, 1874; he offered to show that for twenty years prior to the date of the writ, July 20, 1897, each of the grantees in said deeds had occupied the demanded premises, and had maintained a fence inclosing them as part and parcel of the prem-

ises and dwelling-house occupied by them. It was admitted that no one of these grantees had occupied the locus for a continuous period of twenty years, and that the locus was not covered by the description of the land contained in any of these deeds. This evidence was excluded, against the exception of the tenant, and the court found for the demandant. This evidence would have warranted the jury in finding that each of the grantees transferred to his successor his possession of the strip of land in question, and that thereby the demandant was continuously kept out of possession.

The ruling in the court below evidently was made on the authority of *Sawyer v. Kendall*, 10 Cush. 241, following dicta in the previous cases of *Ward v. Bartholomew*, 6 Pick. 409, 415, *Allen v. Holton*, 20 Pick. 458, 465, *Melvin v. Proprietors of Locks etc.*, 5 Met. 15, 32, 38 Am. Dec. 384, and *Wade v. Lindsey*, 6 Met. 407, 413, cited in that case.

³⁸⁰ Where possession has been actually, and in each instance, transferred by the one in possession to his successor, the owner of the record title is barred from maintaining an action to recover the land.

In some cases this conclusion has been reached on the ground that in such a case there is the necessary privity or continuity of possession between the successive trespassers within the doctrine on which *Sawyer v. Kendall*, 10 Cush. 241, was decided; *Weber v. Anderson*, 73 Ill. 439; *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835; *Smith v. Chapin*, 31 Conn. 530; *Schrack v. Zubler*, 34 Pa. St. 38; *Chilton v. Wilson*, 9 Humph. 399, 405; *Vandall v. St. Martin*, 42 Minn. 163, 44 N. W. 525; *Crispen v. Hannavan*, 50 Mo. 536; *Adkins v. Tomlinson*, 121 Mo. 487, 494, 26 S. W. 573; *Coogler v. Rogers*, 25 Fla. 853, 882, 7 South. 391; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402; *Shuffleton v. Nelson*, 2 Saw. 540, Fed. Cas. No. 12,822; *Winn v. Wilhite*, 5 J. J. Marsh. 521, 524.

There are other cases which reach the same result by a different road. These cases go on the ground that the position of a tenant, who seeks to make out the defense of the statute of limitations by proving the possession of a succession of persons, is not like that of one who seeks to establish an easement by showing that a succession of persons had prescribed for it. These cases hold that in case of the defense of the statute of limitations the only question is, whether the demandant has been kept out of possession continuously for the legal time, not whether the persons who kept him out of possession held one

under the other: *Carter v. Barnard*, 13 Q. B. 945, 952; *Dixon v. Gayfere*, 17 Beav. 421, 430; *Willies v. Howe*, [1893] 2 Ch. 545, 553; *Fanning v. Willcox*, 3 Day, 258; *McNeely v. Langan*, 22 Ohio St. 32; *Shannon v. Kinny*, 1 A. K. Marsh. 3, 10 Am. Dec. 705; *Scheetz v. Fitzwater*, 5 Pa. St. 126. And see *Chapin v. Freeland*, 142 Mass. 383, 387, 56 Am. Rep. 701, 8 N. E. 128; *Harrison v. Dolan*, 172 Mass. 395, 397, 52 N. E. 513.

Where possession of land has been held for the statutory period by successive disseisors or trespassers, the defense of the statute is not made out if the possession has not been continuous, because where a disseisor in fact abandons his possession and leaves the land vacant, the seisin of the true owner reverts; there is a new departure from that time, and the owner can rely on his new seisin by reverter as the ground of an action within the statutory period: *Agency Co. v. Short*, 13 App. Cas. 793; *Solling* ³⁶¹ *v. Broughton*, [1893] App. Cas. 556, 561; *Cunningham v. Patton*, 6 Pa. St. 355, 358, 359; *Louisville etc. R. R. Co. v. Philyaw*, 88 Ala. 264, 268, 6 South. 837; *Jarrett v. Stevens*, 36 W. Va. 445, 450, 15 S. E. 177.

In *Sawyer v. Kendall*, 10 Cush. 241, the lot in controversy had been set off to the grantor of the demandant, and the lot next to it to the tenant, in the partition of their father's estate made by commissioners duly appointed. The premises in controversy and the parcel of land set to the tenant were then inclosed by one fence, and so remained until the lot in controversy was conveyed to the demandant. He put up a fence between the two lots and brought the writ of entry to recover possession of his lot in the same month in which it was conveyed to him—namely, in March, 1848. Both lots “were mostly used as pasture land, and were approached in two ways, both of which led across the latter [the demanded premises]. The tenant proved that during the life of her husband the premises in dispute, and the parcel set to her, had been used by him, and since his death by her, by turning cattle into the parcel set to the tenant; and that they thence went into and depastured the tract in controversy. It also appeared that the tenant had gathered apples from the trees on the latter place, and driven cattle over and across the same. This use, as aforesaid, was exercised by the husband of the tenant from 1820 till 1832, and from that time till the date of the writ, by the tenant herself, more than thirty years in the whole.”

Sawyer v. Kendall, 10 Cush. 241, therefore, was a case where no continuity of possession had been made out by the tenant,

and the decision was finally put upon that ground. After stating that during her coverture the tenant could commit no act of disseisin, and that until the death of her husband he was in possession by his own act of disseisin, the opinion is as follows: "She shows no deed or devise of the land to herself by her husband. Upon his death, therefore, the seisin was in his heir at law, or the seisin of the true owner revived, and the subsequent disseisin by her was her own separate act, unconnected with the previous disseisin of her husband."

It would be going very far to hold that the possession of the husband and that of his wife after his decease were continuous, where the only act relied on to make out adverse possession consists ³⁶² in turning out on the tenant's land cows which stray thence on to the land in controversy—there being no fence between the two—supplemented by an occasional gathering of apples from the demandant's land. *Sawyer v. Kendall*, 10 Cush. 241, went no further than that.

We are of opinion that that case is to be confined to the point actually decided, and cannot be held to be an authority for all the statements in the opinions in that case and in the cases cited.

Where a trespasser in possession of land actually transfers his possession to another, or where one disseisor is disseised by another, it is not true, as was held in *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas. No. 11,347, that there is in contemplation of law of necessity a momentary reverter of seisin to the true owner, for the reason that a trespasser or a disseisor has nothing which he can transfer to another. *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas. No. 11,347, was a decision of the circuit court of the United States sitting to try an action of ejectment to recover land in the state of Pennsylvania; the decision was promptly repudiated by the supreme court of that state in *Overfield v. Christie*, 7 Serg. & R. 173, and had ceased to be an authority when first cited in this commonwealth in *Allen v. Holton*, 20 Pick. 458. See, also, the subsequent cases of *Scheetz v. Fitzwater*, 5 Pa. St. 126, 131; *Moore v. Small*, 9 Pa. St. 194, 196. It is settled that one who has the possession of land is thereby invested with a right to that land which, in the absence of a better title, will be enforced by law: *Slater v. Rawson*, 6 Met. 439; *Hubbard v. Little*, 9 Cush. 475; *Currier v. Gale*, 9 Allen, 522; *Pollock and Wright on Possession*, 95-98; and this possession and the right arising out of it may be transferred in pais to another.

Exceptions sustained.

Adverse Possession—Tacking.—That successive adverse possessions may be joined together to make up the period of limitation, see *Woodruff v. Roysden*, 105 Tenn. 491, 80 Am. St. Rep. 905, 58 S. W. 1066; *Sutton v. Clark*, 59 S. C. 440, 82 Am. St. Rep. 848, 38 S. E. 150. A paper transfer is not necessary to connect the possessions of successive occupants: *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 80 Am. St. Rep. 54, 82 N. W. 534; *Rembert v. Edmondson*, 99 Tenn. 16, 63 Am. St. Rep. 819, 41 S. W. 935.

McCARTHY v. TIMMINS.

[178 Mass. 378, 59 N. E. 1038.]

MASTER'S LIABILITY FOR SERVANT'S ACT.—THE RULE AS TO THE EXTENT of the liability of a master for the acts of his servant is, that if the act is done without the authority of the master and not for the purpose of executing his orders or doing his work, then he is not responsible; but if it is done in the execution of the authority given by the master and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful. (p. 491.)

MASTER'S LIABILITY FOR NEGLIGENCE OF DRIVER.—The driver of a public carriage who, when ordered to drive to the stable at the close of the day's work, turns from his course to a saloon to get a drink and there leaves the team unattended, is not acting within the scope of his employment, and his employer is not liable to one injured by the horses running away. (pp. 491, 492.)

Tort against the proprietor of public carriages for the negligence of his driver, one Scott, in leaving the team unattended, by reason of which it ran away and collided with the conveyance of the plaintiff. At the close of the plaintiff's testimony, the judge directed a verdict for the defendant. The verdict was returned as directed, and the plaintiff alleged exceptions.

W. Burns, for the plaintiff.

N. Matthews, Jr., and S. R. Spring, for the defendant.

379 **HAMMOND, J.** The only question argued by the defendant is whether, under the circumstances, he is answerable for the act of Scott in leaving the team unattended upon a public street. Upon this question it appeared that on the day of the accident Scott was, and for a long time had been, in the employ of the defendant as a driver of the hack and two horses constituting the team. Scott's business was to stand with the team near the corner of Dartmouth and Boylston streets to solicit passengers for carriage. About 6 o'clock on the after-

noon of the accident he was ³⁸⁰ told by one Casey, the starter in charge of the defendant's teams, to take the team to the defendant's stable in Allston, distant westerly about a mile and a half. The team was then standing on Dartmouth street, about one hundred and sixty feet north of Boylston street, facing northerly toward Commonwealth avenue, and the shortest and most direct route to the stables was northerly on Dartmouth street, then westerly on Commonwealth and Brighton avenues. Instead of taking this route Scott turned the horses around, drove southerly on Dartmouth street one hundred and sixty feet to Boylston street, then westerly on this street about three thousand feet to Massachusetts avenue, then southerly on this avenue seven hundred and fifty-eight feet to Dundee street; and then he turned his horses in so as to face Dundee street. Leaving the team there unattended, he entered the saloon where he purchased and drank some whisky. The evidence tended to show that he was in the saloon only about three minutes, but while he was there the horses ran away, and before they were stopped the team came into collision with the plaintiff's team, which was on the right-hand side of Massachusetts avenue going toward Boylston street, and the plaintiff was injured.

Scott, called by the plaintiff, testified that when he turned the corner on Dartmouth street and started down Boylston street he was not expecting to do any business for his employer, but was going "to help myself." While he was going westerly on Boylston street, which runs parallel with Commonwealth avenue, he was going in the direction of the stables, but when on reaching Massachusetts avenue, instead of turning northerly on that avenue, he turned southerly toward Dundee street and the saloon, he was going directly away from the proper and usual route to the stables. The only witness who testified as to Scott's purpose in taking this route was Scott himself, whose testimony in substance was that his purpose was to get a drink.

The well-established rule as to the extent of the liability of the master for the act of his servant, so far as material to this case, is that if the act is done without the authority of the master, and not for the purpose of executing his orders or doing his work, then he is not responsible, but if it is done in the execution of the authority given by the master and for the purpose of performing ³⁸¹ what he has directed, then he is responsible, whether the act be negligent or willful.

The only trouble is in the application of the rule, and it is not easy to reconcile the cases. Scott had been employed to drive the team in the carriage of passengers, and that work was ended for the day. He was then directed to go to the stables, and there can be no doubt that so long as he drove the team with that end in view, and for that purpose and for no purpose of his own, he was engaged in his master's business, even if he made a detour contrary to the direction of his master. We are not disposed to lay much stress on the fact that he went down Boylston street rather than Commonwealth avenue, but when he reached Massachusetts avenue it is plain that his only purpose in turning southward instead of northward, and going seven hundred and fifty-eight feet to Dundee street, was not only to deviate from the regular way of reaching the stable, but was for a purpose of his own—namely, to get a drink. He was upon no errand of his master, and this journey was not for the purpose of getting to the stables even by a circuitous route, or, to use the language of Hoar, J., in *Howe v. Newmarch*, 12 Allen, 49, 57, he was doing an act wholly for a purpose of his own, disregarding the object for which he was employed, and not intending by his act to execute it, and not within the scope of his employment. In such case the defendant should not be held answerable.

Whatever may be the view entertained elsewhere as to the application of the principle to facts like these (see *Ritchie v. Waller*, 63 Conn. 155, 38 Am. St. Rep. 361, 28 Atl. 29), we do not feel it necessary to review the numerous cases in our state and elsewhere bearing upon the question. Reference, however, may be made to the following cases as illustrative of the rule: *Howe v. Newmarch*, 12 Allen, 49, 57; *Wallace v. Merrimack River Nav. etc. Co.*, 134 Mass. 95, 45 Am. Rep. 301; *Walton v. New York Cent. etc. Co.*, 139 Mass. 556, 2 N. E. 101; *Bowler v. O'Connell*, 162 Mass. 319, 44 Am. St. Rep. 359, 38 N. E. 498; *Storey v. Ashton*, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, 2 C. P. D. 357. See, also, *Perlstein v. American Express Co.*, 177 Mass. 530, 59 N. E. 194.

It is contended, however, by the plaintiff that the intent of Scott in turning south when he reached Massachusetts avenue and going to the saloon on Dundee street is a question of fact, ³⁸² and that the jury might have disbelieved him; and they point to the fact that Scott originally told a different story, and told this one only after he had had a conversation with the defendant. It is to be noted, however, that Scott was called

by the plaintiff, that his earlier stories in no way concerned his motives for going to the saloon, and that the whole theory of the plaintiff's case seemed at the trial to be that Scott went into the saloon. The ruling of the court was made at the close of the plaintiff's evidence. There did not appear any conflict of evidence, and we think the question of the veracity of Scott cannot be raised now before us. In the opinion of a majority of the court the exceptions must be overruled.

Master's Liability for Driver's Acts.—If a servant intrusted with his master's team turns aside from his employment on business of his own, the master is not liable for his acts then done: See the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 81. See, in this connection, *Brown v. Boston Ice Co.*, 178 Mass. 108, ante, p. 469, and cross-reference note thereto, 59 N. E. 644.

PEOPLE'S SAVINGS BANK v. WUNDERLICH.

[178 Mass. 453, 59 N. E. 1040.]

MORTGAGE SALE—ADVERTISEMENT.—IF THERE HAS BEEN A RELEASE of part of the mortgaged property, and the advertisement for sale includes all the land originally encumbered, while by the terms of the mortgage all the land over which the mortgagee has a power of sale is the land remaining after the release, the sale is not a valid execution of the power. (p. 494.)

Bill by the assignee of a second mortgage to redeem land from a sale under a power in the first mortgage. The land sought to be redeemed embraced three lots. The first mortgage originally covered these three and also a fourth lot, but the fourth had been released from the mortgage. The defendant, Wunderlich, was the assignee of the first mortgage. On this mortgage coming overdue, he instructed an attorney to foreclose it. The attorney, not knowing of the partial release, advertised the entire property. He afterward learned of the release, and the auctioneer stated to those at the sale that the fourth lot had been released and that he would sell only the three. The sale was made to one Craig. In the present suit there was a decree declaring the plaintiff entitled to redeem the lots, and referring the case to a master to state the account. From this decree both Wunderlich and Craig appealed.

J. A. Bailey, Jr., for the plaintiff.

W. B. Orcutt and W. L. Baker, for the defendants.

⁴⁵⁶ LORING, J. The mortgage in question provided that in case of default the mortgagee might "sell the granted premises or such portion thereof as may remain subject to this mortgage in case of any partial release hereof." There was a partial release of one of the four lots originally covered by the mortgage, on payment of twelve hundred dollars, leaving eight hundred dollars of the mortgage debt due. Under the circumstances existing at the date of the advertisement under which the sale in question took place, all the land, over which the assignee of the mortgage had a power of sale, was the remaining three lots; but by mistake he advertised for sale all four lots. At the time of the sale the lot (which had been released from the lien of the mortgage two years and a half before) had a house on it worth two thousand five hundred dollars, and the remaining three lots of land were vacant. Apparently, this house had not been built when this lot was released. The sum paid for the release of the one lot released was three-fifths of the mortgage debt, and the price which the remaining three lots brought at the auction sale in question was one-half the mortgage debt. This is a case, therefore, where the mortgagee has included in the advertisement a lot over which he had no power of sale, in addition to three lots covered by the mortgage; further, the lot, wrongfully included in the advertisement, when vacant, was worth more than the three lots rightfully included, and in addition, it had on it a house worth more than three times the amount then due on the mortgage, while the three lots covered by the mortgage were vacant land. The natural effect of such an advertisement would be to induce the belief in those who saw it that at the sale either the lot on which the house was would be put up first and would bring more than the amount of the mortgage, or that, as is generally the case, the four lots would be put up in one parcel. Therefore, the class of customers ⁴⁵⁷ who are looking for vacant lots rather than for a dwelling naturally would not care to attend the sale, and would not do so. The statement of the auctioneer would not help this, as there was no postponement and no new notice.

The real estate advertised was substantially different from what the mortgagee sold or had a right to sell, and the sale was not a valid execution of the power given him: *Fenner v. Tucker*, 6 R. I. 551.

Since the advertisement included all the land originally covered by the mortgage, while by the terms of the mortgage all

the land over which the mortgagee then had a power of sale was the land remaining after the partial release, the defendants can get no support from cases like *Colcord v. Bettinson*, 131 Mass. 233, and *Bell etc. Min. Co. v. First Nat. Bank of Butte*, 156 U. S. 470, 15 Sup. Ct. Rep. 440, where the advertisement follows the mortgage; but these cases make against them. Neither does the case of *Pryor v. Baker*, 133 Mass. 459, support this contention; in that case the advertisement described what the defendant had a right to sell, what was in fact sold, and nothing more.

The land was bought by the defendant "Craig, by his agent, Wunderlich," who was the assignee of the mortgage and who was at the time, and since has continued, in the employ of Craig. On this evidence the court had a right to treat Craig as having no greater rights than Wunderlich. No new rights having intervened since the sale, the bill is well brought within six years after it took place.

Decree affirmed.

A Notice of a Mortgage Sale which describes the land as containing four acres more than the tract of land mortgaged, is insufficient, though the tract to be sold is contained in the tract advertised: See the monographic note to *Hoffman v. Anthony*, 75 Am. Dec. 706.

DANFORTH v. GROTON WATER COMPANY.

[178 Mass. 472, 59 N. E. 1033.]

CONSTITUTIONAL LAW.—THE LEGISLATURE MAY CALL A LIABILITY INTO BEING where there was none before, if the circumstances are such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seems small. (p. 497.)

CONSTITUTIONAL LAW.—ONE HAS NO VESTED RIGHT in a defense based upon an informality not affecting his substantial equities. (p. 497.)

CONSTITUTIONAL LAW—VESTED RIGHT.—Where the right to damages from the exercise of eminent domain has been lost by neglect to observe a mere formality in procedure, a statute dispensing with such formality is not unconstitutional as to those who had a good defense at the time of its passage, though its secondary and incidental effect is to remove the bar of the statute of limitations. (pp. 496, 498.)

W. H. Bent, C. K. Cobb, and W. D. Whitmore, Jr., for the petitioners.

W. F. Wharton, for the respondent.

⁴⁷⁵ HOLMES, C. J. These are petitions to the superior court for a jury to assess damages for the taking of water rights. The respondent filed motions to dismiss on the ground that the petitioners had not applied first to the county commissioners. The superior court dismissed the petitions, and on report its action was sustained by this court: *Danforth v. Groton Water Co.*, 176 Mass. 118, 57 N. E. 351. The decision was rendered on May 17, 1900. On May 3d had been passed chapter 299 of the statutes of that year, but it escaped everyone's attention until after the rescript had gone. A rehearing subsequently was granted by agreement of all concerned, on the single question of the effect of that act upon this case.

The water was actually withdrawn in November, 1897, and was taken not later than that date. By the respondent's charter, the right of the petitioners to apply for the assessment of damages was limited to one year from the taking. Therefore, as the law stood just before the enactment of Statutes of 1900, chapter 299, the petitioners had lost their chance of recovery from the respondent, because it then was too late to file new applications, and, as the previous decision in this case has shown, the petitions on file could not be entertained.

The statute provides that no such petition as the present "now or hereafter pending in the superior court . . . shall be dismissed for want of jurisdiction in said court solely on the ground that no previous application for the assessment of such damages had been made to a board of county commissioners." These words seem to us plainly to apply to the present petitions. ⁴⁷⁶ It is true that the petitions had been ordered to be dismissed, but the orders were made subject to a report to this court, as we have said, and the cases were still pending in the superior court. There can be no doubt of the intent of the statute, and the only question is whether it is constitutional with regard to those who, like the respondent, at the time of its passage had a good defense. There certainly is a strong argument that as against parties in the respondent's position the act cannot be sustained.

In *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209, in which it was held by a majority of the court that a repeal of the statute of limitations as to debts already barred violated no rights of the debtor under the fourteenth amendment, Mr. Justice Miller speaks as if the constitutional right relied on were a right to defeat a just debt. But the constitutional right asserted was the same that would be set up if the legis-

lature should order one citizen to pay a sum of money to another with whom he had been in no previous relations of any kind. Such a repeal requires the property of one person to be given to another when there was no previous enforceable legal obligation to give it. Whether the freedom of the defendant from liability is due to a technicality or to his having had no dealings with the other party, he is equally free, and it would seem logical to say that if the constitution protects him in one case, it protects him in all. With regard to cases like *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209, under the state constitution the later intimations of this court have been that such a repeal would have no effect: *Bigelow v. Bemis*, 2 Allen, 496, 497; *Prentice v. Dehon*, 10 Allen, 353, 355; *Ball v. Wyeth*, 99 Mass. 338, 339. See, also, *Kinsman v. Cambridge*, 121 Mass. 558; *Rockport v. Walden*, 54 N. H. 167, 20 Am. Rep. 131; *McCracken County v. Mercantile Trust Co.*, 84 Ky. 344, 1 S. W. 585; *Cooley's Constitutional Limitations*, 6th ed., 448.

Nevertheless, in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was ⁴⁷⁷ consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power: *Camfield v. United States*, 167 U. S. 518, 523, 524, 17 Sup. Ct. Rep. 864. But however that may be, multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

In some such cases there has been at an earlier time an enforceable obligation, in others there never has been one, but in both classes the courts have laid hold of a distinction between the remedy and the substantive right, or have said that

"a party has no vested right in a defense based upon an informality not affecting his substantial equities" (Cooley's Constitutional Limitations, 6th ed., 454), or that "there is no such thing as a vested right to do wrong" (Foster v. Essex Bank, 16 Mass. 245, 273, 8 Am. Dec. 135), or have called it curing an irregularity (Thomson v. Lee County, 3 Wall. 327, 331; Lane v. Nelson, 79 Pa. St. 407; Randall v. Kreiger, 23 Wall. 137), or have dwelt upon the equities, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written constitution from interfering with the power to make small repairs which a legislature naturally would possess.

In a case which would seem almost stronger than that of a debt barred by the statute of limitations, it was held that services of an unlicensed physician which could not be recovered for when rendered were made a good cause of action by a repeal of the statute which created the bar: Hewitt v. Wilcox, 1 Met. 154. So in case of a usurious contract after a repeal of the usury law: Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. Rep. 408.

The constitutional difficulties in the way of the present statute are as small as they well can be. Its effect in saving the petitioners from being barred by the statute of limitations in the respondent's charter is only secondary and accidental. All that it does directly which is open to question is to enact that parties ⁴⁷⁸ having a case in court shall not be turned out for neglect of what, under the circumstances, was a naked and useless form. The case is stronger for the petitioners than Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209, or Hewitt v. Wilcox, 1 Met. 154. The respondent had incurred a legal obligation to them which, although not contractual, was voluntary and legal, and which was entitled to the highest protection of the law, as it sprang from the exercise of eminent domain. The petitioners were enforcing the obligation in good faith. There is no especially striking equity in favor of defeating them because of a mistake of procedure, and as the legislature now has said that they shall not be defeated, we have not much hesitation in yielding to the current of decisions and in accepting its mandate as authoritative in this case.

Motions overruled.

Vested Rights.—The legislature cannot deprive a defendant of a vested right in an existing material defense: Magular v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182; although it may change the form

of remedy, provided no substantial right secured by contract is thereby impaired: *Merchants' Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481. As a rule, statutes that prohibit or take away a certain defense not appertaining to the merits are constitutional, and do not impair vested rights: See the monographic note to *Goshen v. Stonington*, 10 Am. Dec. 136. A retrospective statute, if conformable to natural justice, will be recognized and enforced: *Town of Bellevue v. Peacock*, 89 Ky. 495, 25 Am. St. Rep. 552, 12 S. W. 1042. The defense of the statute of limitations is a vested right: *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433; *Whereatt v. Worth*, 108 Wis. 291, 81 Am. St. Rep. 899, 84 N. W. 441, 84 N. W. 441.

BURT v. TUCKER.

[178 Mass. 493, 59 N. E. 1111.]

TRADEMARK—ORIGINALITY.—The right to a trademark does not depend on originality, even as against the originator of the characteristic use. (p. 500.)

TRADEMARK—WHEN ESTABLISHED.—Where for two years, in his jobbing and general retail trade, a shoe manufacturer used a certain mark, not to designate a particular style, but to cover a wide range of shoes, and used other marks, but mostly for special goods for particular houses, such mark becomes the general one for his goods. (p. 500.)

TRADEMARK—ABANDONMENT AND RESUMPTION.—Where one has discontinued his business for four years, during which time others have used his trademark, he may be entitled as against them to resume its use. (p. 501.)

TRADEMARK—CHANGE IN FORM AND USE.—If a manufacturer of shoes acquires the word "Knickerbocker" as a trademark, confining it mainly to the form "Knickerbocker School Shoes," then goes out of business, and subsequently becomes a seller of shoes for another as a jobber, and resumes the use of the name, dropping the word "School" from it, and adopting "Knickerbocker Shoe Company" as the title of his concern, such use is within the scope of his original acquisition. (p. 502.)

A. P. Browne and N. F. Hesseltine, for the plaintiffs.

S. L. Whipple and G. F. Bean, for the defendant.

⁴⁹⁹ **HOLMES, C. J.** This is a bill to restrain the infringement of an alleged trademark consisting of the word "Knickerbocker," as applied to boots and shoes. In the answer a prior use and acquisition of the trademark by the defendant is set up. The case is here on the evidence, by appeal from a decree of the superior court dismissing the bill, after a finding that the facts were as alleged in the answer.

In considering whether the defense is made out, of course we shall assume in favor of the finding that the defendant was an honest witness, as he had every appearance of being, so far as the printed answers go. It was admitted in the argument before us that the defendant was the first to use the word. It would have to be admitted also that when he resumed the use he did so in ignorance of what the plaintiffs had done in the meantime, so that in its dramatic aspect the case for the defendant is pretty strong. The plaintiffs, however, deny that the defendant ever did more than to use the word as an advertising device, and insist that if he did get a trademark it was abandoned as matter of fact and of law, and further that the defendant now is making ⁵⁰⁰ a use of the word not within the scope of any right which he may have acquired.

We assume in favor of the plaintiffs that they might be entitled to prevail notwithstanding the fact that the defendant first used the word in its present connection, and that the right to a trademark does not depend upon originality, even as against the originator of the characteristic use: *Menendez v. Holt*, 128 U. S. 514, 521, 9 Sup. Ct. Rep. 143; *Royal Baking-Powder Co. v. Raymond*, 70 Fed. 376. We therefore assume that the points toward which the plaintiffs have directed their argument are the points necessary to be considered, and that what we have called the dramatic aspect of the facts is not conclusive of the equities upon which the decision of the case must turn.

In the first place, then, it is to be considered whether the defendant ever had a trademark. Upon this question the finding of the superior court seems to us fully warranted by the evidence. From 1894 to 1896 the defendant used the mark, very largely, as he says, in the jobbing trade in New York and in the general retail trade, especially through the middle states and the west. He used it not to designate a particular style of shoe, but to cover a wide range of shoes which he manufactured and sold. It is true that he also used other names, but most of them were used for the special goods of particular houses only, and one which was started for general use, "Excelsior," became appropriated to a single firm. Without intimating that a man could not have more than one trademark for his boots and shoes, we are of opinion that the judge was warranted in finding that by the course of the defendant's business, "Knickerbocker" became his general mark for his goods, or for a large variety of them.

There is more difficulty on the question of abandonment, but in view of the testimony of the defendant we are not prepared to say that the finding of the superior court was wrong. If we should adopt the plaintiffs' contention that the defendant's intent is immaterial, then the question would be whether, from lapse of time or the public abandonment of his business, or from other causes, the goodwill associated with the name had melted away, either gradually or at once. In July, 1896, the defendant's factory in Massachusetts was burned and he went out of business. ⁵⁰¹ From that time until July or August, 1900, he worked for others as a salesman in other states. During those four years, of course, he made no use of his trademark. Then he began business again on his own account in Philadelphia, selling goods of a New Jersey company as a jobber, and then he resumed the use of the name on his packages, adopting it as a title for his concern, "Knickerbocker Shoe Company." Certainly it is hard to believe that a name which had not been more or longer associated with the defendant's goods than this had been still should have value from any goodwill once attached to it. But the defendant testified, at least by implication, that it did, and the extent to which his testimony should carry credence is a matter on which we cannot undertake to revise the opinion of the judge who saw him: *Royal Baking-Powder Co. v. Raymond*, 70 Fed. 376, 380; *Mouson v. Boehm*, 26 Ch. Div. 398; *Julian v. Hoosier Drill Co.*, 78 Ind. 408, 412; *Browne on Trademarks*, sec. 680.

It may be argued that there is another aspect of the facts just stated, also irrespective of intent. It may be contended that discontinuing the use of the trademark, at least when coupled with abandonment of the business, amounts to a notification of the public that anyone is free to use the mark, and that the defendant cannot go behind the import of his acts after the plaintiffs have taken up the use, although the old goodwill still attaches to the name, whatever the private intent of the defendant may have been. But it is plain that there is no such meaning absolutely attached to a discontinuance of use, and it seems to us that even when the business also is discontinued, it is not a necessary conclusion that the use of the mark at once is free to all. Or, at least, to put it more cautiously, whatever rights may have been gained by the plaintiffs if they used the mark in good faith in the interval of discontinuance, the defendant still may be entitled as against them to resume his use: *Mouson v. Boehm*, 26 Ch. Div. 398, 407,

408; *Levy v. Waite*, 61 Fed. 1008; *Julian v. Hoosier Drill Co.*, 78 Ind. 408, 412.

In the cases and text-books intent is assumed to be important: *Browne on Trademarks*, sec. 681. Perhaps it might be so as giving a character to the ambiguous fact of discontinuing the use of the mark. Perhaps if the use were given up with the intent never to resume it, that would amount to an offer of it to the public ⁵⁰² which anyone might accept at once, although giving up the use with intent to resume would not have that effect. If this should be so, and if a trademark may be lost under such circumstances before the vanishing of the goodwill associated with it, here again it is something of a stretch to believe that the defendant, during the four years that he was a salesman, continuously intended to resume business on his own account and again to use the name. But it is perfectly possible; he says that he did, and the superior court has found accordingly, and in this matter also we have no sufficient ground for going behind its view of the facts.

Finally, the plaintiffs argue that the defendant is attempting to make his old trademark cover a new meaning, as well as to change its form. It was used on shoes manufactured by him in Massachusetts, and seems in fact to have been confined mainly to shoes for young people, in connection with the word "school" ("Knickerbocker School Shoes"). It now is used upon shoes made by another firm in New Jersey and sold by him in Philadelphia. It is pointed out also that he has taken his word into his business and dropped "school" altogether. Again we have to fall back on the findings. We cannot say that the judge was not warranted in finding that the word originally indicated the source from which the shoe was recommended, rather than that of its manufacture—a judgment of excellence which more or less commends itself to buyers. If so, it might be found that the present case is like the former in its characteristic features, and if that were found and it were established that the defendant could use the trademark on the shoes which he intended to sell, we see no ground on which the plaintiffs could prevent his incorporating the same word into his business name.

It will be seen that we nowhere undertake to say what our decision would have been on the printed evidence had it come before us in the first instance. We confine ourselves, according to the settled practice, to considering whether we can say that the judge who saw the witnesses necessarily was wrong

upon matters which depended very largely on the degree to which they were believed.

Bill dismissed.

Trademarks.—What constitutes a trademark and an infringement thereof are discussed in the monographic notes to *Partridge v. Menck*, 47 Am. Dec. 284-299; *Kyle v. Perfection Mattress Co.*, 85 Am. St. Rep. 83-125.

The Abandonment of a Trade name is not shown by a temporary disuse thereof: *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346, 63 Pac. 480.

WHITING v. BURKHARDT.

[178 Mass. 535, 61 N. E. 1.]

INSURANCE—ASSIGNMENT OF MORTGAGEE'S INTEREST.—If an insurance policy on property is issued to the mortgagors payable to the mortgagee as his interest may appear, the assignment by the mortgagee of his interest in the policy is not a violation of a condition against the assignment of the policy. (p. 504.)

INSURANCE—POWER OF MORTGAGEE TO ASSIGN.—A mortgagee to whom a policy of insurance is made payable as his interest may appear may assign to the assignee of the mortgage the right to receive on the same terms the proceeds of the policy. (p. 504.)

INSURANCE.—THE ASSIGNMENT BY ONE OF THE MORTGAGORS of his interest in insured property does not avoid the right of the mortgagee to recover on a policy payable to him, and providing that the act of no one other than himself or those claiming under him shall affect his right to recover in case of loss. (p. 505.)

APPEAL.—THE OBJECTION TO A BILL IN EQUITY that the plaintiff has a plain and adequate remedy at law cannot be raised for the first time in this court. (p. 505.)

Bill by the plaintiff Whiting against H. F. Burkhardt, A. J. Jewell, and the North British and Mercantile Insurance Company, to recover as mortgagee for a loss by fire to the mortgaged property. The policy was issued by the defendant company, and its proceeds were claimed by each of the other defendants, if the plaintiff was not entitled thereto. The policy was issued to the mortgagors, Burkhardt and one Guptill, payable to the mortgagee, Jewell, as his interest might appear. Jewell subsequently assigned the mortgage, and also his interest in the policy of insurance, to the plaintiff. And Guptill conveyed his interest to one Pratt, and his interest was also

sold on execution to an attaching creditor. All these assignments and transfers were without the knowledge or consent of the insurance company. The property was destroyed by fire; and it appeared that the damage at least equaled the insurance, and that the amount due on the mortgage exceeded the total insurance.

W. C. Cogswell, for the plaintiff.

A. M. Lyon, F. C. Gilpatrick, and J. H. Appleton, for the defendants.

538 LORING, J. The assignment by Jewell of all his right and interest in the policy was not a violation of the provision that the "policy shall be void . . . if . . . without the assent in writing or in print of the company . . . this policy [shall be] assigned." The object of that provision (coupled with the provision declaring the policy void if the property insured is sold) is to prevent the company becoming the insurer of the property of a person who is not acceptable to it; an insurance company has the right to refuse to insure a person whose character is such that the moral risk (to use a term employed in the insurance business) is greater than it is where the same property is owned by an honest man, and is a risk which they do not care to assume. The transfer prohibited by this provision is a transfer of the contract of insurance; that is to say, a transfer by Guptill and Burkhardt, the persons insured; not a transfer by Jewell, who was the person designated as the person entitled to receive the proceeds of the insurance, if any, due under the contract between the company on the one hand and Guptill and Burkhardt on the other. The distinction is plainly and fully pointed out in *Fogg v. Middlesex Ins. Co.*, 10 Cush. 337, 346; *Phillips v. Merrimack Ins. Co.*, 10 Cush. 350, 353; *Mutual Life Ins. Co. of New York v. Allen*, 138 Mass. 24, 28, 29, 52 Am. Rep. 245; *Merrill v. Colonial Mut. Ins. Co.*, 169 Mass. 10, 13, 14, 61 Am. St. Rep. 268, 47 N. E. 439. What Jewell did by assigning his "right and interest in this policy" was not to transfer the policy, but to assign to another his right to receive the proceeds, if any, under it; the policy remained after the assignment, as it was before, the policy of Guptill and Burkhardt.

We see no reason why Jewell should not make the assignment made by him. The policy was made payable to him as "mortgagee, as his interest may appear"; he assigned his right to receive the proceeds, if any, to the assignee of the mortgage

in question, and the plaintiff's right to receive the proceeds of the insurance was subject to this clause in the hands of the plaintiff, and could not be held by him for any debt other than the debt secured by that mortgage.

⁵³⁹ The conveyance by Guptill of his interest in the building insured did not affect the right of the plaintiff to recover in case of loss; it is provided in the policy that: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate." This mortgage was originally made payable to "Jewell, mortgagee," and after the assignment by Jewell of his interest to the plaintiff, who had in fact become the assignee of the mortgage in question, it continued to be "payable to a mortgagee," and, as we have said, it could not have been held by the plaintiff for any debt other than the mortgage debt in question.

The objection that there is a plain, adequate, and complete remedy at law was not set up in the answers or any of them, and being raised for the first time in this court, is not taken in time: *Jones v. Keen*, 115 Mass. 170; *Crocker v. Dillon*, 133 Mass. 91; *Parker v. Nickerson*, 137 Mass. 487.

A decree must be entered directing the defendant insurance company to pay to the plaintiff the amount of the policy, with interest from September 4, 1899.

So ordered.

Insurance—Recovery by Mortgagee.—If a policy of fire insurance makes the loss payable to the mortgagee, and also provides that no violation of its conditions by the mortgagor shall affect the mortgagee, the latter may recover to the extent of his interest, notwithstanding such violation: See the monographic note to *Oakland Home Ins. Co. v. Bank of Commerce*, 58 Am. St. Rep. 672; *Lancashire Ins. Co. v. Boardman*, 58 Kan. 339, 62 Am. St. Rep. 621, 49 Pac. 92.

Insurance.—If a mortgagor procures a policy of insurance on the premises to be issued to himself but payable to the mortgagee, the former is the insured: See the monographic note to *Oakland Home Ins. Co. v. Bank of Commerce*, 58 Am. St. Rep. 667; *Reynolds v. London etc. Ins. Co.*, 128 Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467.

LEAHAN v. COCHRAN.

[178 Mass. 566, 60 N. E. 382.]

PRIVATE NUISANCE—LIABILITY OF GRANTEE.—The grantee of land on which is a private nuisance is not answerable for continuing it, unless he has had notice to abate, or at least until he has had knowledge that it is a nuisance and injurious to the rights of others. (p. 507.)

PUBLIC NUISANCE—LIABILITY OF GRANTEE.—A property owner who maintains a public nuisance on the sidewalk is liable to one sustaining personal injuries therefrom, though the nuisance existed when he became the owner of the premises and he had not been requested to reform it. (pp. 507, 508.)

Tort for injuries sustained by falling on the sidewalk in front of the defendant's premises. At the close of the plaintiff's case, the defendant requested the judge to rule that the plaintiff could not maintain the action: 1. Because on all the evidence the plaintiff could not recover; 2. Because it appeared that the defendant did not construct the building, the conductor, the gutter, or the sidewalk in question, and had not been requested to remedy the same; 3. Because there was no evidence tending to show that the defendant constructed or created the nuisance, or had been requested to remedy it. The judge refused to give these rulings, and the defendant excepted. There was a verdict for the plaintiff, and the defendant alleged exceptions.

C. W. Bond, for the plaintiff.

G. C. Abbott, for the defendant.

⁵⁶⁸ **HAMMOND, J.** The evidence tended to show that affixed to the house of the defendant was a conductor, constructed and used for the purpose of carrying water from the roof to the public sidewalk adjoining; that there was a groove in the sidewalk, extending from the end of the conductor to the outer edge of the sidewalk; that the water from the conductor had frozen in and about the groove upon the sidewalk, and that the plaintiff, while traveling in the exercise of due care over the ice, was injured. The evidence warranted a finding that in the winter the natural and probable result of the situation would be the formation of ice upon the sidewalk, which would be dangerous to public travel, and therefore a public nuisance.

At the time of the accident the defendant had been the owner of the house for several years, but there was no evidence that the defendant constructed the building, the conductor, the groove, or the sidewalk; and it appeared that the condition of the conductor at the time of the purchase was, and ever since had been, the same as at the time of the accident. There was no evidence that the defendant ever had been requested by the plaintiff or by any other person to preform the nuisance, or that the plaintiff ever complained of it to the defendant.

⁵⁶⁹ The action is at common law, and the question whether the notice requisite to the maintenance of an action under Public Statutes, chapter 52, section 18, was given is immaterial. It is not argued that the evidence did not warrant a finding that this conductor in its natural operation did create a nuisance in the highway. The only question presented is whether the court erred in declining to give the second and third rulings requested by the defendant. These requests raise the question whether, the situation being the same as at the time of the purchase by the defendant, she can be held answerable to the plaintiff in the absence of any request made to her to reform the nuisance.

There can be no doubt that in the case of a private nuisance the general doctrine in this country, following *Penruddock's Case*, 5 Coke, 205, is that the grantee of land upon which, at the time of the grant, there exists a nuisance created by his predecessors in title is not responsible merely because he has become the owner of the land. His liability arises from his knowingly continuing the nuisance; and generally it may be stated that he is not answerable for continuing the nuisance in its original state unless he has had notice to abate, or at least until he has had knowledge that it is a nuisance and injurious to the rights of others; and while there is some dissent from this doctrine (see opinion of Denio, J., in *Brown v. Cayuga etc. R. R. Co.*, 12 N. Y. 486, of Strong, J., in *Hubbard v. Russell*, 24 Barb. 404, and of Manning, J., in *Caldwell v. Gale*, 11 Mich. 77), still it must be regarded as the law of this commonwealth: *McDonough v. Gilman*, 3 Allen, 264, 80 Am. Dec. 72, and cases cited.

The cases are numerous in which this doctrine has been applied to private nuisances, but with the exception of *Woram v. Noble*, 41 Hun, 398, we have seen no case where the doctrine has been directly applied to the case of a public nuisance,

although in *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358, and *Dodge v. Stacy*, 39 Vt. 558, the court seems to have failed to notice any difference in this respect between private and public nuisances.

We think the rule should not be extended to a public nuisance like that in this case. The reason generally given for the rule is that in the absence of any notice to the contrary, the grantee has the right to assume that the structures upon the land are rightfully there, and that even where they may seem to interfere ⁵⁷⁰ with the usual rights appurtenant to other estates, he may properly assume that the right thus to interfere has been lawfully obtained; and it is said that it would be inequitable to subject him to damages until he has had notice that in maintaining the structure or work complained of he is infringing upon the rights of others.

The reason of the rule is not applicable to a case like this. The conductor in its natural and intended use caused ice to form upon the sidewalk, which, being dangerous to public travel, was a public nuisance. No matter how often the ice was formed, the right thus to encumber the street could not be lawful. The right to create such a nuisance was not a matter of grant, nor could it have been acquired by prescription: *Holyoke v. Hadley Co.*, 174 Mass. 424, 426, 54 N. E. 889; *New Salem v. Eagle Mill Co.*, 138 Mass. 8. In so far as the conductor by its natural operation caused the formation of such ice, it was creating a nuisance. The defendant as owner must have known this or must be presumed to have known it. In such a case, the reason for the requirement of a notice does not exist, and we see no reason why the rule should be applied: See *Matthews v. Missouri Pac. Ry.*, 26 Mo. App. 75.

Exceptions overruled.

OF THE LIABILITY OF A PROPERTY OWNER FOR A NUISANCE WHICH HE DID NOT CREATE.*

I. The Basis of Liability for Nuisances.

II. Private Nuisances.

- a. Respective Liability of Grantor and Grantee.
- b. Notice to the Grantee.
- c. Grantee's Liability for Injuries Resulting.
- d. Respective Liabilities of Lessor and Lessee.

*REFERENCES TO MONOGRAPHIC NOTES.

Liability of a landlord letting premises in a defective condition: 66 Am. St. Rep. 785-789.

Liability of owners of premises defectively constructed or out of repair: 59 Am. Dec. 733-740.

Liability of grantor and grantee respectively for nuisances: 14 Am. Dec. 336-341.

Liability of landlord and tenant respectively for nuisances: 50 Am. Dec. 776-782.

1. The Lessor's Liability.
2. Notice to the Lessor.
3. Wrongful Acts of Tenants and Others for Which Lessor is not Answerable.
4. Tenant's Liability.
5. Joint and Several Liability of Lessor and Lessee.
 - a. Liability of Grantees and Lessees of Railways.
 - f. Liability of Mortgagees.
 - g. Liability of Heirs and Devisees.
 - h. Beneficiaries Under a Trust.

III. Public Nuisances.

I. The Basis of Liability for Nuisances.

It has been said that it is not a general rule that the owner of premises is, as such, responsible for a nuisance thereon. It is the occupier to whom such responsibility generally and prima facie attaches: See *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193. This is a statement of a coincidence rather than of a principle. The real basis of liability for the consequences flowing from a nuisance rests neither on the ownership nor the occupancy of the premises upon which it exists. The occupant, as such, is not answerable for the nuisance; neither is the owner, as such, answerable. It is the one who creates a nuisance, or who knowingly continues it if created by another, that is answerable for the consequences. The bare fact of occupancy or of ownership imposes no responsibility. The liability for a nuisance springs from the wrongful act of creating or continuing it, rather than from owning or occupying the premises. If the owner or the occupier of property creates a nuisance thereon, he is liable, not because he owns or occupies the premises, but because he created the nuisance. And if the owner or the occupier of property continues a nuisance created thereon by others, he is liable, not because he owns or occupies the premises, but because he does not abate the nuisance.

These principles are illustrated by the following cases: The owner of property is not liable for a nuisance created thereon by a stranger, without his knowledge or authority: *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672, 4 N. E. 188. See, too, *Maenner v. Carroll*, 46 Md. 193, 215; *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324. Neither is he liable where he rents property in good condition, and his tenant creates a nuisance which he does not authorize or have knowledge of: *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757. On the other hand, one who creates a nuisance on the land of another is answerable for its continuance, though he has no right to enter to remove it: *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; citing *Thompson v. Gibson*, 7 Mees. & W. 456. And a tenant is liable for creating a nuisance

on the demised premises: *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Durant v. Palmer*, 29 N. J. L. 544.

One who creates a nuisance on his own land cannot escape the responsibility for it by conveying or letting the property to another. And his grantee or his lessee does not become liable for the nuisance merely by suffering it to remain. Though they own or occupy the premises, they become liable for the nuisance only when they continue it after knowledge of its hurtful tendencies or after notice or request to remove it: *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786; *Wunder v. McLean*, 134 Pa. St. 334, 19 Am. St. Rep. 702, 19 Atl. 749.

One is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or negligence. If such consequences are caused by the acts of others so operating on his own as to produce the injury, he is not answerable: *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582; *State v. Rankin*, 3 S. C. 438, 16 Am. Rep. 737. Thus, if accumulations of noxious matter and polluted water, constituting the nuisance complained of, are caused by ditches and embankments on the land of others over which the defendant has no control, he is not liable for the consequences because this foul water flowed from a higher point on such land across his. The owner of the premises from which the polluted water flows or the noxious substances come is the responsible party: *Brimberry v. Savannah etc. Ry. Co.*, 78 Ga. 641, 3 S. E. 274.

II. Private Nuisances.

a. **Respective Liability of Grantor and Grantee.**—One who erects a nuisance on his premises is liable for its continuance even after he has parted with the title and possession, especially where he has conveyed with covenants of warranty or for quiet enjoyment. He cannot escape liability by parting with the title. He is answerable for a continuance of the nuisance, if, from the terms of the conveyance, he can fairly be said to affirm or uphold it. The ground upon which the grantor is held liable is that he is the author of the original wrong, and transferring the premises with such wrong still existing is treated as affirming the continuance of it: *Dorman v. Ames*, 12 Minn. 451; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631; *Waggoner v. Jermaine*, 3 Denio, 306, 45 Am. Dec. 474; *Lohmiller v. Indian Ford etc. Co.*, 51 Wis. 683, 8 N. W. 601.

The grantor is not liable, however, for a nuisance created by his grantee. Thus, where the owner of land lays it off into lots and streets, sewers the streets, and sells the lots with an easement in

the sewers, retaining no control, and the grantees and others connect their premises with the sewers, creating a nuisance, the grantor is not liable therefor: *Moore v. Langdon*, 2 Mackey, 127, 47 Am. Rep. 262.

The grantee of land upon which there exists a nuisance created by his predecessors in title is not responsible merely because he becomes the owner of the premises. The fact that he suffers it to remain does not render him liable: *London v. Mullins*, 52 Ill. App. 410; *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757; *Morris Canal etc. Co. v. Ryerson*, 27 N. J. L. 457; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358. His liability, if any, arises from knowingly continuing the nuisance. And a failure to remove a nuisance erected by another does not constitute a continuance of it. There must be some active participation in the continuance of it, or some positive act done evidencing the adoption of it: *Walter v. County Commrs.*, 35 Md. 385.

Generally speaking, the grantee is not liable for continuing the nuisance in its original condition unless he has been notified or requested to remove it, or at least until he has knowledge that it is a nuisance and is injurious to the rights of others: *Groff v. Ankenbrandt*, 124 Ill. 51, 7 Am. St. Rep. 342, 15 N. E. 40; *Wegner v. Meyer*, 95 Ill. App. 68; *West v. Louisville etc. R. R. Co.*, 8 Bush, 404; *Schreiber v. Driving Club*, 39 N. Y. Supp. 348, 17 Misc. Rep. 131; *De Laney v. Georgia etc. Ry. Co.*, 58 S. C. 357, 79 Am. St. Rep. 843, 36 S. E. 699; *Dodge v. Stacey*, 39 Vt. 558.

This rule is not inconsistent with the doctrine that every continuance of a nuisance is a new nuisance, but "is adopted for the reason that it would be a great hardship to hold a party responsible for consequences of which he may be ignorant": *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396, 407.

The reason for the rule as stated in the principal case is "that in the absence of any notice to the contrary, the grantee has the right to assume that the structures upon the land are rightfully there, and that even where they may seem to interfere with the usual rights appurtenant to other estates he may properly assume that the right thus to interfere has been lawfully obtained; and it is said that it would be inequitable to subject him to damages until he had notice that in maintaining the structure or work complained of he is infringing upon the rights of others." As is said in *Leitzsey v. Columbia Water Co.*, 47 S. C. 476, 25 S. E. 744, "this rule is based on the reason that it would be unjust to subject a person, not the creator of the nuisance, to a suit for the nuisance of which he was ignorant, and which he did not intend to continue."

The expression is often met with in the reports that the grantee is not liable for the continuance of the nuisance unless he has been requested to remove or abate it: *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Staples v. Dickson*, 88 Me. 362, 34 Atl. 168; *East-*

man v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Pierson v. Glean, 14 N. J. L. 36, 25 Am. Dec. 497. "This rule," says Sherman, J., in Johnson v. Lewis, 13 Conn. 303, 33 Am. Dec. 405, "is very reasonable. The purchaser of property might be subjected to great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot easily be known, except to the party injured. A plaintiff ought not to rest in silence, and finally surprise an unsuspecting purchaser by an action for damages, but should be presumed to acquiesce until he requests a removal of the nuisance."

Some authorities assert that where a party was not the original creator of the nuisance, he must have notice of it, and a request must be made to remove it, before any action can be brought: Central Trust Co. v. Wabash etc. Ry. Co., 57 Fed. 441, 450; Philadelphia etc. R. R. Co. v. Smith, 64 Fed. 679, 682. The more reasonable rule is that it must be shown that he had notice or knowledge of the existence of the nuisance, but that no special request to remove or abate it is necessary: Pinny v. Berry, 61 Mo. 359, 365; Conhocton Stone Road v. Buffalo etc. R. R. Co., 51 N. Y. 573, 582, 10 Am. Rep. 646.

b. Notice to the Grantee.—No particular form of notice is necessary. It may be written or oral, or by acts clearly giving the party notice of the claim for a removal of the nuisance: Carleton v. Redington, 21 N. H. 291, 311. There is no presumption, however, that a grantee has notice of an existing nuisance, and it is not incumbent on him to show want of notice: Castle v. Smith (Cal., March 28, 1894), 36 Pac. 859. Though notice may be inferred in some instances, as where he comes into possession of premises whose condition is such that their possessor must know that they constitute a dangerous nuisance: Ahern v. Steele, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193. Knowledge by a grantee of the continuance of a nuisance, when he acquired title, is not shown by the fact that he had knowledge of a judgment against his grantor for a like nuisance existing on the land the year previous to the conveyance: Nichols v. Boston, 68 Mass. 39, 93 Am. Dec. 132.

Notice to the alienee is not essential if the injuries complained of are occasioned by changes made by himself in the character or structure of the nuisance. In such case his own act caused the injury, which would not have happened if he had continued the premises as they were when he came into possession: Middlebrooks v. Mayne, 96 Ga. 449, 23 S. E. 398; Norton v. Volentine, 14 Vt. 239, 39 Am. Dec. 220. Yet he is entitled to notice if he merely repaired or rebuilt the structure so long as such repairs or reconstruction did not increase or enlarge the nuisance or render it more noxious: Grigsby v. Clear Lake Water Co., 40 Cal. 396, 407; Castle v. Smith

(Cal., March 28, 1894), 36 Pac. 859. If he knowingly or actively continues the nuisance, he is not entitled to notice: *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193; *Whitenack v. Philadelphia etc. R. R. Co.*, 57 Fed. 901. However, if a lessee continues a nuisance of a nature not essentially unlawful, he is answerable only after notice to reform or abate it. The continuance of a lime-kiln is within this rule: *Slight v. Gutzlaff*, 35 Wis. 675, 17 Am. Rep. 476.

If the grantee was an actor in creating the nuisance, the rule that one purchasing premises with a nuisance thereon is not liable until requested to remove it does not apply: *Steinke v. Bentley*, 6 Ind. App. 663, 34 N. E. 97. After notice of a nuisance or demand for its removal, the grantee of the original creator of the nuisance is liable for its continuance: *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132; *Leltzey v. Columbia Water Power Co.*, 47 S. C. 446, 25 S. E. 744; *Townes v. City Council*, 52 S. C. 405, 29 S. E. 851.

The grantee may waive his right to insist upon notice. And he does so when he joins in an answer with one who cannot claim it, and distinctly bases his defense solely upon other grounds than the want of notice, and proceeds, till after the proofs are closed, to try the case solely upon the defenses set up in the answer, without any reference to the question of notice: *Bartlett v. Siman*, 24 Minn. 448.

There has been some dissent from the doctrine that a grantee of premises upon which a nuisance had been created by his predecessors in title is entitled to notice before a liability arises against him for its continuance. Manning, J., in delivering the opinion of the court, in *Caldwell v. Gale*, 11 Mich. 77, 84, said: "We are not aware of any case holding it necessary to give such notice to the author of the nuisance, before bringing an action against him. He cannot claim it. It therefore is a right, if it be a right at all, pertaining to his grantee. Now, why should there be this difference between one who erects a nuisance on his own land, and his grantee, who afterward sustains and upholds it? It is said defendant may not have known that the dam was injurious to the plaintiff, or that his rights were impaired by it. The same may be said of the author of the nuisance; and if such a plea is not good in his mouth, why should it be in that of his grantee? The wrong is none the less a wrong, so far as it regards the injured party, because the wrongdoer intended no injury. Why is want of notice no excuse when coming from the author of the nuisance? Because it is a fundamental principle of law that no man shall so use his own property as to injure another, by encroaching on his rights. We know of no exception to this rule, unless it be the one in question; and we see no reason why it should not and does not apply with all its force as strongly against the grantee as his grantor. But it is or may be further said that the grantee may suppose his grantor has acquired

the right to flow, from the owner of the land. He may suppose the same in regard to the title to the land purchased by him; but if his grantor had no title, he would have none, and no notice would be necessary to sustain ejectment to oust him of his possession. And so it seems to us in regard to the right to use the land in a way to injure another. If his grantor had not acquired the right to flow, he could not have it. It is clearly his duty to look into the right of his grantor before purchasing in the one case as in the other." Some of the earlier New York cases express a similar doctrine: See *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 52 Barb. 390; *Brown v. Cayuga etc. R. R. Co.*, 12 N. Y. 486. But these cases are repudiated in *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573, 10 Am. Rep. 646. The Michigan case, therefore, seems to stand alone. We must confess that the arguments therein advanced are not, at least at first glance, without force. Their fallacy consists in grounding the liability for a nuisance upon the ownership of the premises, instead of on the creation or the continuance, with knowledge, of the nuisance. Participation in the wrong is what gives rise to the liability, and there can be no real participation by the grantee in a wrong of which presumably he has no notice. See "The Basis of Liability for Nuisances," ante, p. 509.

c. *Grantee's Liability for Injuries Resulting.*—If there is an obviously defective structure on the premises, the grantee is liable for an accident resulting from a failure to repair the structure. It is presumed that a grantee, before purchasing real estate, examined it and was cognizant of its situation and surroundings, and of its obvious state of repair: *Palmore v. Morris etc. Co.*, 182 Pa. St. 82, 61 Am. St. Rep. 693, 37 Atl. 995.

The purchaser of the reversionary interest in real estate upon which a nuisance exists, and of which he has full knowledge, and who thereafter receives the rents from the tenant in possession, is answerable for damages arising from such nuisance subsequently to his purchase: *Pierce v. German Sav. etc. Soc.*, 72 Cal. 180, 1 Am. St. Rep. 45, 13 Pac. 478. But where one becomes the owner of leased premises on which a nuisance already exists, he cannot be made liable therefor without proof of notice of the existence of the nuisance: *Woram v. Noble*, 41 Hun, 398; *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193. He who purchases premises with a nuisance on them maintained by a tenant, is not answerable for its continuance when it does not appear that he has any control of the tenant or of the use of the premises made by him. Even if he has power to enter and expel the tenant, he is not bound to do so for the benefit of the party injured by the nuisance: *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757.

Where one purchases premises in the occupancy of tenants under a demise for short periods of time from the prior owner, and a nu-

sance arises after the purchase and after he begins to receive the rents, he will be treated, the periods being short, as having relet the premises with the nuisance thereon, and be held liable for it: *Rex v. Pedly*, 1 Ad. & E. 822.

A grantee under a power of sale in a mortgage is liable for injuries suffered by a person walking on a sidewalk in front of the premises by reason of a defect in the cover of a coal-hole, existing, and open and visible, at the time of the sale, where the owner of the equity of redemption released any title he might have to the grantee and remained in possession as a tenant at will and was in occupation at the time of the injury: *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841.

Where an electric light plant, the operation of which will permanently injure adjacent property, is constructed and tested by one and then sold to another who operates it, damages, both past and future, may be recovered against either or both of them, though only one recovery can be had: *Hyde Park etc. Light Co. v. Porter*, 167 Ill. 276, 47 N. E. 206.

d. **Respective Liability of Lessor and Lessee.**—The general rules governing the respective liability of lessor and lessee for a nuisance on the demised premises are thus stated in *Henson v. Beckwith*, 20 R. I. 165, 78 Am. St. Rep. 847, 37 Atl. 702: "1. Where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their use, then, whether in or out of possession, he is liable for injuries resulting from such nuisance; 2. Where premises are let for rent or profit to be used for purposes for which they are not fit or safe, and all this was known, or ought to have been known, to the lessor, he is also liable for such use; 3. Where property, at the time of a demise, is not a nuisance, and an injury happens by some act of the tenant or while he has entire possession and control of the premises, the owner is not liable."

1. **The Lessor's Liability.**—A landlord cannot escape liability for an existing nuisance by leasing the property to a tenant and putting him in possession. Where an owner of land demises it with a nuisance upon it, especially if he created it himself, he is presumed to authorize its continuance by putting it in the power of another to continue it, and he is answerable to a third person subsequently injured thereby, notwithstanding the demise: *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Wunder v. McLean*, 134 Pa. St. 334, 19 Am. St. Rep. 702, 19 Atl. 749; notes to *Lowell v. Spaulding*, 50 Am. Dec. 780; *Willcox v. Hines*, 66 Am. St. Rep. 787. So he is answerable if he lets a building unfit for the purpose for which it is leased: *Carson v. Godley*, 26 Pa. St. 111, 67 Am. Dec. 404; or if he demises premises

and covenants to keep them in repair, and omits to repair them, and they thus become a nuisance; or if he demises them to be used as a nuisance or for a business, or in a way so that they will become a nuisance: *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193; or when he leases his property for the purpose of having it used in the mode which causes such nuisance, if from the nature of the business, or otherwise, he knew, or had reason to believe, that the carrying on of the business was likely to be injurious to another: *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254.

And it may be said in general that where the owner of premises knows, or can by the exercise of reasonable care ascertain, that they have upon them a nuisance dangerous to the public or to an adjoining owner, it is his duty to abate it before he leases the property. If he leases it without doing so, he will be liable to respond in damages to anyone injured by and in consequence of the nuisance, even though he did not create it: *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786.

If a tenant creates a nuisance without the authority of the landlord, the latter is not liable: *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757. But if the landlord not only authorizes but permits the act of a tenant which causes the nuisance occasioning the injury, but contributed to it by furnishing material to be used in its construction, he is answerable: *Riley v. Simpson*, 83 Cal. 217, 23 Pac. 293. And where a nuisance is created by a lessee under a lease by which he covenanted to keep the premises in repair, and on the expiration of the lease it is renewed with like covenants, the landlord not taking actual possession, but knowing of the injury arising from the nuisance, the landlord is liable: *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109.

8. **Notice to the Lessor.**—The lessor must have notice, as a rule, of the existence of a nuisance on the premises at the time he lets them, in order to charge him with liability for its subsequent continuance: *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573, 10 Am. Rep. 646; *Ahern v. State*, 115 N. Y. 203, 12 Am. St. Rep. 778, 793, 22 N. E. 193. And he is not answerable for a nuisance carried on on the premises if he did not have any reason to believe that the premises would be so used as to be injurious to the complaining party: *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254.

The lessor of property to be used as a licensed bawdy-house is not liable for a consequent injury to adjoining proprietors, unless he leased it knowing of the intended use, or continued the leasing after he had acquired knowledge of such use, and knew that it had become a nuisance notwithstanding the license: *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421. Though one who rents a house with knowledge that it is to be used for prostitution is liable to an adjacent proprietor: *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272.

If premises were so used as to constitute a nuisance when let, yet if it was reasonably practicable to use them for the purpose for which they were let without creating or continuing the nuisance, then it cannot be said that the landlord by letting them authorized the creation or the continuance of the nuisance. He is, therefore, not liable if the tenant continues to so use them as to create or continue a nuisance: *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757. And the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage: *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84. Where the nuisance complained of consists of the use of a defective cesspool by the tenant, the latter's liability for such use cannot take the place of or in any manner affect that of the landlord, if the cesspool was not properly built, or was out of repair when the tenant was put in possession. But if the cesspool was properly built and in good repair when the tenant took possession, the landlord will not be liable for the consequences of the tenant's neglect to keep in repair: *Wunder v. McLean*, 134 Pa. St. 334, 19 Am. St. Rep. 702, 19 Atl. 749.

3. Wrongful Acts of Tenants and Others for Which Lessor is not Answerable.—A landlord is not answerable to third persons for injuries they sustain, occasioned by the wrongful act of the tenant or a stranger in placing the rented premises in a dangerous condition, unless he has contracted with the tenant to repair; or has let the premises in a ruinous condition; or has expressly licensed acts amounting to a nuisance: *Edgar v. Walker*, 106 Ga. 154, 32 S. E. 582; *Curran v. Flammer*, 62 N. Y. Supp. 1061, 49 App. Div. 293; note to *Lowell v. Spaulding*, 50 Am. Dec. 781. Thus, where the defendant leased premises to a tenant, who by permission of the city, constructed a vault under the sidewalk in front, with a coal-hole in a proper and usual manner, but by the wrongful act of a stranger, the stone supporting the corner of the hole was broken, and the cover turning when the plaintiff stepped upon it, he fell and was injured, and the defendant had no knowledge or notice of the defect, he is not liable: *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672, 4 N. E. 188. And in *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 571, where one was injured by a defective grating in the sidewalk, the court said: "If the grate is properly constructed in the first place, and is kept in proper repair afterward, the owner is not liable for the carelessness of a tenant or third parties in using the grate, as by leaving the hole unguarded when in use, or uncovered when not in use." The owner of premises will not be liable to an injured party for failure to keep a scuttle in the sidewalk in repair if it was in

good condition when possession was given under the lease: *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422.

So the landlord is not liable when a customer of the tenant falls from an unfenced walk leading from the street to the premises, where the walk is safe enough in the daytime but the tenant keeps the place open as a market at night: *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; nor when an injury occurs from overcrowding a gallery, and causing it to fall, if it was safe as ordinarily used: *Edwards v. New York etc. R. R. Co.*, 25 Hun, 634; nor when a chimney belonging to the property is a nuisance when coal is used, but not if coke is, and the tenant uses coal: *Rich v. Basterfield*, 4 Com. B. 783.

If a landlord is bound by express agreement with his tenant to keep the premises in repair, a party injured by a defect or want of repair may have his action against the landlord in the first instance to avoid circuity of action: *Gridley v. Bloomington*, 68 Ill. 47; *Milford v. Holbrook*, 9 Allen, 17, 21, 85 Am. Dec. 735; *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775. But a lessee who covenants with the lessor to keep the premises in repair, and who sublets the property which afterward becomes ruinous, is not answerable to one injured by the defective condition: *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391, 2 Car. & K. 257.

The general principles applicable to the above classes of cases are stated by Earl, J., in *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659, to be these: "If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which anyone lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises the premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence which will in many cases impose responsibility upon him. If he creates a nuisance upon his premises and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the same nuisance. But where the landlord has created no nuisance, and is guilty of no willful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between the cases of a demise of dwelling-houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other delictum which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him": See, also, *Riley v. Simpson*, 88 Cal. 217, 23 Pac. 293.

4. **Tenant's Liability.**—Generally speaking, the occupant or tenant, and not the owner, of premises is responsible for injuries to third persons occasioned by the condition of the demised premises: *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800; *Clancy v. Byrne*, 58 N. Y. 129, 15 Am. Rep. 391. However, a lessee does not become liable for a nuisance existing on the premises merely by accepting the lease. To render him liable, it must be shown that he had notice of its existence, or that time enough had elapsed in which he could by the exercise of proper care have obtained such knowledge: *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786; *Slight v. Gutzlaff*, 35 Wis. 675, 17 Am. Rep. 476.

Still it is not necessary to show that he was notified of the existence of the nuisance or requested to abate it. It is sufficient if it appears that he knew of its existence: *Dickson v. Chicago etc. R. R. Co.*, 71 Mo. 575; though it is held in *McDonough v. Gilman*, 3 Allen, 264, 80 Am. Dec. 72, that the tenant is not liable for continuing the nuisance until the party injured distinctly and unequivocally complains to him of the injury, and informs him that he is expected to act in the matter and remove it.

In those cases where a nuisance exists at the time of the creation of an estate for years, and the lessee does nothing but maintain the premises in the condition in which he receives them, he who suffers from the nuisance must look to the landlord, and not to the tenant, for redress: *Meyer v. Harris*, 61 N. J. L. 83, 99, 38 Atl. 690. Though the tenant, after notice to remove the nuisance, is liable for damages resulting from its continuance, upon the theory that by suffering it to remain he is, in effect, keeping up and maintaining it just as if he originally had caused it to exist: *Western etc. R. R. Co. v. Cox*, 93 Ga. 561, 20 S. E. 68.

But where property is demised in good condition, and a nuisance results from the acts or negligence of the tenant, he alone, and not the landlord, is liable for resulting injuries to third parties: *Owings v. Jones*, 9 Md. 108; *Durant v. Palmer*, 29 N. J. L. 544. See, also, *West Chicago etc. Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327, 61 N. E. 439. The lessee will be liable for injuries occasioned by a defective scuttle in the sidewalk if it was in good condition when possession was given under the lease: *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422. And a tenant who, during his term, erects an insecure fence on the premises may be liable to one injured by it after he has surrendered possession to the landlord: *Hussey v. Ryan*, 64 Md. 426, 54 Am. Rep. 772, 2 Atl. 729.

When leased premises, harmless in themselves, become dangerous merely by the manner of their use by the tenant, the landlord is not answerable for injuries arising from such use: *Eyre v. Jordan*, 111 Mo. 424, 33 Am. St. Rep. 543, 19 S. W. 1095. The tenant and not the landlord, is liable when the latter has safely and properly built a coal-vault under or adjoining the sidewalk, with an opening

to the surface with the permission of the municipality, and the former carelessly leaves the coal-hole open, whereby someone is injured: *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424.

A tenant is liable for restoring a building constituting a nuisance which was erected by the lessors before the commencement of the tenancy but abated afterward. But he is not liable for merely refitting the building after it was injured: *McDonough v. Gilman*, 3 Allen, 264, 80 Am. Dec. 72.

5. **Joint and Several Liability of Lessor and Lessee.**—Both the tenant and landlord may be liable for the consequences of a nuisance on the demised premises. If the landlord erects a nuisance and then lets the property, he may be liable for the creation of the nuisance and the tenant for the maintenance of it. They are considered joint tortfeasors: *Gordon v. Peltzer*, 56 Mo. App. 599; citing *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84. For continuing a nuisance, lessors, assignees of lease, lessees, and sublessees are jointly liable: *Rogers v. Stewart*, 5 Vt. 215, 26 Am. Dec. 296. Where a coal-hole constituting a nuisance has been excavated in the sidewalk, and it is used by a subsequent lessee of the premises for the benefit of which it was made, the lessee is liable, separately or jointly, with the lessor, for injuries sustained from it: *Irvin v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603.

A trustee demising property while in such a condition as to be a nuisance is guilty of a misfeasance, and during the continuance of his estate is liable for any damages caused thereby. But the beneficiaries under the trust are not responsible for any nuisance created or permitted by him: *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193.

e. **Liability of Grantees and Lessees of Railways.**—One in whose possession and control a railway is placed, with power and authority to continue its use, is equally liable with the original owner for a nuisance arising from the manner of its construction: *Tate v. Missouri etc. Ry. Co.*, 64 Mo. 149. A railway company, as the grantee and successor of another company that has maintained a nuisance, is answerable for damages occasioned by its continuance, of which it has sufficient notice: *Hunt v. Iowa Cent. Ry. Co.*, 86 Iowa, 15, 41 Am. St. Rep. 473, 52 N. W. 668. And the lessee of a railway is liable for the continuance of a nuisance, if he has knowledge thereof, created by his predecessor in interest: *Hulett v. Missouri etc. Ry. Co.*, 80 Mo. App. 87. But where a railroad company constructed jetties in a river to protect its bridge, but they were not on the right of way, a company that subsequently purchases the road, without assuming the duty to keep them in repair or adopting them in any way, is not liable for injuries to ad-

jacent lands caused by the failure to repair or remove the jetties: *Fordyce v. Russell*, 59 Ark. 312, 27 S. W. 82.

f. **Liability of Mortgagees.**—A mortgagee is, after notice, liable as the continuer of a nuisance on the premises created by the mortgagor, where his rights and duties respecting the property, as they are set forth in a contract between him and the mortgagor, are not essentially different from those the law would impose in the case of a mortgagee in possession: *Ferman v. Lombard Inv. Co.*, 56 Minn. 166, 57 N. W. 309.

g. **Liability of Heirs and Devisees.**—An heir or devisee succeeding to an estate can be made liable only after notice or request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered or contributed to injuries resulting therefrom: *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193. In *Gandy v. Jubber*, 5 Best & S. 76, the owner of premises with a nuisance thereon let them to a tenant from year to year, and died, having devised the property. The devisee, without notice of the condition of the premises, permitted the tenant to remain in occupation and received the rent. It was held that he was not liable for damage caused by the nuisance, on the ground that he had relet the premises with the nuisance thereon.

h. **The Beneficiaries Under a Trust** are not responsible for damages occasioned by a nuisance created or permitted on the trust estate by the trustee: *People v. Townsend*, 3 Hill, 479, approved in *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 779, 22 N. E. 193.

III. Public Nuisances.

Some of the authorities seem to assume that the liability of one who comes into the possession or ownership of property upon which there already exists a nuisance rests upon the same principles in the case of a public nuisance as in that of a private one. In *Bruce v. State*, 87 Ind. 450, the defendants, as the owners by descent of a mill-dam, were found guilty of maintaining a public nuisance. But a new trial was ordered on the ground that the evidence failed to show any connection between the defendants and the dam, except that they inherited it. There was no evidence of any act done by them in relation to the dam complained of as a nuisance.

The doctrine that where one acquires title to land upon which is a nuisance, his mere omission to abate or remove it does not render him liable, but that he becomes liable only after he has notice or knowledge of the hurtful tendency of the nuisance or after he has been requested to abate it, has been applied in several cases apparently without regard as to whether the nuisance was

private or public: See *Crommelin v. Coxe*, 30 Ala. 318, 68 Am. Dec. 120; *Cloverdale v. Smith*, 128 Cal. 230, 60 Pac. 851; *Staples v. Dickson*, 88 Me. 362, 84 Atl. 168; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358; *Woram v. Noble*, 41 Hun, 298; *Dodge v. Stacy*, 39 Vt. 558.

In the principal case (*Leahan v. Cochran*, ante, p. 506), it is distinctly held that a grantee of premises upon which there has been created a public nuisance by his predecessors in title is not entitled to notice. This distinction between private and public nuisances in the requirement of notice is also recognized in *Vaughn v. Buffalo etc. Ry. Co.*, 25 N. Y. Supp. 246, 72 Hun, 471. The action in that case was brought for personal injuries caused by a continuing defect in the original construction of a substituted highway which was built by a railroad company on its occupying the original highway with its track. The defendant corporation was the successor in title to the company that constructed the substituted highway, and it was held liable without notice of the defective condition of the road.

The following quotation is an extract from the opinion of this case: "The contention of counsel in support of the demurrer is that, without any allegation of notice of the defect in the highway as restored or constructed by its predecessor in title, the complaint fails to state a cause of action against the defendant, and they rely upon the cases of *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573, 10 Am. Rep. 646, and *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193, as authority for that proposition. We find both of the cases cited clearly distinguished from the case at bar, and neither of them authority for the application of the rule in respect to notice to this case. The former was an action to recover damages for an injury to the plaintiff's roadbed caused by the same being washed and flooded by the waters of a stream which the complaint alleged was dammed by an embankment and bridge of the defendant. The evidence showed that the structures complained of were erected many years before, by the predecessor in title of the defendant, and there was no evidence that the defendant had notice of any defect of construction which was liable to cause an injury such as that complained of. It was held in that case that such notice was necessary to give a cause of action against the successor in title who merely permitted the nuisance to exist.

"The distinction between that case and the present is manifest. The thing complained of in that case was a private nuisance erected on the property of one corporation and affecting only the property of another. The wrong in that case was in the plan of construction of the bridge, and the damage resulted only in case of a flood in the stream, which, it seems, had not before occurred since the de-

fendant obtained the title. In this case, on the contrary, the nuisance was a public one, rendering dangerous a public highway of the town, and its existence was directly due to a violation of a public statute of the state, by a failure to restore the highway to its former condition of usefulness. This was primarily the duty of the defendant's predecessor in title; but it was a continuing duty, and its neglect was a continuing violation of the law, and that whether by the first owner of the railroad or its successor in title."

The doctrine of this and the principal case as to the nonrequirement of notice of a public nuisance seems sound. The continuance of such a nuisance is a public offense, of which the owner of the premises is chargeable with notice as a matter of law. He must be presumed to know, in legal contemplation, of its existence. Hence the requirement of notice has no application to his case.

One who obstructs a public highway, and those in possession claiming under him, are indictable, the one for creating and the others for continuing the nuisance: *State v. Yarrell*, 12 Ired. 130. However, it is held in *State v. Pollok*, 4 Ired. 303, that where the owner of property obstructs a highway and subsequently conveys the land to one who never actually enters into it, but leases it to others who keep up the obstruction, such grantee and lessor is not indictable for the continuance of the nuisance by the lessees. The person who erected the obstruction "and those who kept it up and used it are guilty of the offense charged in the indictment. But the defendant is not responsible for their acts, in which he had no participation by aiding in or procuring them to be done. . . . To make one guilty of a crime, some personal agency or delinquency of his own is requisite."

A person is liable for damages caused by a public nuisance which he permits to be established on property under his control, although incidental to a work otherwise lawful, or erected by an independent contractor: *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 South. 395. By employing an independent contractor to do work on a building, the owners or occupants thereof cannot relieve themselves of a continuing duty to the public not to create or maintain a nuisance on their premises. Nor can the municipality in which the building is located be absolved from a like duty in respect to permitting a nuisance to be maintained in its streets: *Moore v. Townsend*, 76 Minn. 64, 78 N. W. 880. See, also, *Vogel v. Mayor*, 92 N. Y. 10, 44 Am. Rep. 349.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BACON v. BOARD OF STATE TAX COMMISSIONERS.
[126 Mich. 22, 85 N. W. 307.]

CORPORATE STOCK, SITUS OF.—Shares of stock in a foreign corporation owned by residents have their situs here for the purposes of taxation. (p. 525.)

THE TAXATION OF SHARES OF STOCK IN A FOREIGN CORPORATION may be in any state in which the owner of such stock resides, though shares of stock in domestic corporations are not taxed to their owners, and all the property of such foreign corporation is taxed in the state of which it is a citizen, and its shares of stock are not there taxable to their owners. (p. 527.)

CITIZEN, WHEN SYNONYMOUS WITH INHABITANT.—A statute declaring that, for the purposes of taxation, personal property includes all shares of stock in foreign corporations, except national banks owned by citizens of this state, does not restrict such taxation to citizens. The word, as here employed, is synonymous with inhabitants. (p. 529.)

STATUTES, CONSTRUCTION OF.—**TAX LAWS** should be liberally construed in favor of the state. (p. 529.)

CONSTITUTIONAL LAW.—The taxation of shares of stock in foreign corporations, when owned by citizens of this state, is not prohibited by section 1 of article 4 of the constitution of the United States, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. (p. 529.)

CONSTITUTIONAL LAW.—The right to tax shares of stock in foreign corporations owned by residents of this state does not depend on whether the capital of the corporation is or is not taxed in the state under whose laws it was created. (p. 529.)

Mandamus to compel the board of tax commissioners to vacate assessments of shares of stock in a foreign corporation.

Avery Brothers and Joseph Walsh, for the relator.

Horace M. Oren, attorney general, for the respondent.

²⁴ LONG, J. Relator is a citizen of this state, a resident of the city of St. Clair, and the owner of a number of shares of stock of the New York Central and Hudson River Railroad Company, of the state of New York. He is assessed upon the tax-roll of said city fifty thousand dollars for personal property. This assessed valuation includes the shares of stock held by him in said railroad company. The real estate of said company, and its capital stock in excess of the real estate, are taxed in the state of New York. The stock owned in the state of New York is not taxed. The relator appeared before the board of state tax commissioners at a meeting held in said city on August 20, 1900, and made application to have said assessment reduced by reason of the fact that, as the property and franchises of said corporation are taxed in the state of New York, the stock is not taxable in this state. The board refused to reduce said assessment, and the matter is presented to this court upon petition for mandamus to compel such reduction.

The questions raised by the parties involve the construction of certain subdivisions of section 3831 of 1 Compiled Laws of 1897. Those provisions are as follows:

“For the purposes of taxation, personal property shall include:

“5. All goods, chattels, and effects belonging to inhabitants of this state, situate without this state, except that property actually and permanently invested in business in another state shall not be included.

“7. All shares in corporations organized under the laws of this state, when the property of such corporations is not exempt, or is not taxable to itself, or when the personal property is not taxed.

“9. All shares in foreign corporations, except national banks, owned by citizens of this state.”

It is contended by counsel for relator: 1. That the statute, in providing for the taxation on foreign stocks, is unconstitutional, in that it is not uniform and equal. The argument is that because, under this statute, an individual holding stock issued by a domestic corporation ²⁵ which pays taxes on its capital stock is not taxed on such individual stock so held by him, the same rule must be applied to persons owning stock in a foreign corporation whose capital stock is taxed. One owning shares in a corporation is substantially the owner of an aliquot part of the property of the corporation, although the

legal title to such property is vested in the corporation, and not in him. The value of his shares can never vary greatly from the value of the property they represent. This is as true of shares of stock in foreign corporations as of those in domestic corporations. The law taxes both, with the exception of where the property of the corporation is taxed in this state. Stated thus (and this is the effect of subdivisions 7 and 9, taken together), there is no want of uniformity of method or rule; and there is no impropriety in thus stating it, for the constitution cannot be supposed to have been framed with a view to what other states might do. It has no jurisdiction over corporations of other states; and when its citizens embark in foreign corporate enterprises, and pay money to them, taking certificates of stock therefrom, this state cannot tax the property of such corporation in its possession outside of this state. Yet, substantially, its citizens have as much property as before; and, if not taxed in another state, there is no reason why it should not be taxed here, like the stock of domestic corporations. The state has said, in effect, to its citizens: "If you invest your property in corporations, you shall be taxed upon the shares, except where the property of the corporation is taxed to the corporation by this state." We may doubt the abstract justice of this; but we believe the state has the power to tax the shares of residents in foreign corporations, and that this power is not affected by the action of another state in imposing taxes upon the corporations. Michigan owes much to the investment of foreign money in her corporations which she taxes, and it is probably to her interest that moneys so invested be not taxed again elsewhere; but she is powerless to prevent it, though it goes without saying that the ²⁰ property in effect is taxed twice. There are the questions of policy and abstract justice involved, both protesting against double taxation; but the legislatures of the states are judges of both policy and propriety, so long as the constitutions have not forbidden it, and the weight of authority supports the claim that, in the absence of clear and express prohibition, they have not.

In the case of *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654, a tax was objected to as violating the constitutional rule of equality and uniformity. It was said: "If the precise point here is that the tax is unequal and unjust because it is not levied in proportion to the business done, then the objection is without force. It may possibly be true that an apportionment according to the business done would have been

more just, but a question of this nature concerns the legislature, and not us. Courts cannot annul tax laws because of their operating unequally and unjustly. If they could, they might defeat all taxation whatsoever, for there never yet was a tax law that was not more or less unequal and unjust in its practical workings. . . . Apportionment of taxation is purely a legislative function."

In *Insurance Co. v. City of New Orleans*, 1 Woods, 85, 89, Fed. Cas. No. 7,052, it was said, quoting from *State v. Lathrop*, 10 La. Ann. 402: "This is a suit for \$1,000 tax on a foreign insurance company, not chartered by this state, and transacting business therein. . . . It is resisted on the ground that the same statute imposes a tax of but five hundred dollars upon an insurance company incorporated by the laws of this state and transacting business therein. The defendant contends that the distinction made between these two classes of insurance companies is a violation of article 123 of the state constitution, which declares that 'taxation shall be equal and uniform throughout the state.' The provision of the constitution relied on by defendant has not deprived the legislature of the power of dividing the objects of taxation into classes. It merely obliges the legislature to impose an equal burden upon all those who find themselves in the same class."

²⁷ This doctrine is supported by *Hughes v. City of Cairo*, 92 Ill. 339; *Lee v. Sturges*, 46 Ohio St. 153, 19 N. E. 560, *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. Rep. 1014; *Graham v. Township of St. Joseph*, 67 Mich. 652, 35 N. W. 808.

We think the determination of this question is for the legislature, and not subject to review by the courts. It appears from the statute itself that shares in foreign corporations are taxed in this state but once, and the shares in domestic corporations or their representatives are also taxed. The question of the effect of statutes of foreign states cannot be considered, nor can such statutes have any effect in this state upon the question of uniformity of the rules of taxation. The stock has a situs in this state, and is subject to the control of the legislature for the purpose of taxation.

2. It is further contended by counsel for relator that the law of 1893 (1 Comp. Laws 1897, sec. 3831) has an element of doubt and uncertainty in it as to the intent of the legislature to include such property for taxation in this state, as it is provided by subdivision 5 that personal property actually and permanently invested in any other state shall not be in-

cluded, while subdivision 9 includes for taxation all shares in foreign corporations owned by citizens of this state, except national bank stocks. It is also contended that it was the intent of the legislature to provide taxation upon such property against citizens of the state; that it is evident the legislature used the word "citizen" in its restricted sense, and that the act was intended to provide taxation against a citizen of the state residing in New York or Ohio, or any other place outside the state—one who returns for the purpose of voting at elections, but resides for the most part in foreign jurisdictions; that the word "citizen," as used in this statute, was intended to reach a large class of persons who are citizens of this state and reside elsewhere; that, under the construction contended for by the respondent, all citizens who are nonresidents of the state²⁸ would escape taxation. It is claimed that the construction contended for by relator is made apparent from the change made in 1893 from the former provisions of the statute; that the statute of 1889 (Act No. 195) provided, as did the law of 1885, for taxation upon all ships, boats and vessels belonging to inhabitants of this state, whether at home or abroad, and all goods, chattels, and effects belonging to inhabitants of this state, situate without this state, and all shares in foreign corporations, except national banks, owned by inhabitants of this state; that the law of 1889 used the word "inhabitant" in providing for taxation upon personal property, while in the enactment of 1893 this word was eliminated, and the word "citizen" substituted, when referring to stock in foreign corporations; that section 3831 of 1 Compiled Laws of 1897, by subdivision 5, provides for taxation upon all goods, chattels, and effects belonging to inhabitants of this state, situate without this state, except that property actually and permanently invested in business in any other state shall not be included; that the word "inhabitants," as used in these statutes, reaches all persons who are residents of the state, while the word "citizens" as used is intended to reach a class of persons who are citizens of the state and reside elsewhere; that by this construction all citizens of the state who are nonresidents of the state could be taxed under this law, while, if it only provided that inhabitants of the state should be taxed, then nonresident citizens would escape taxation; and it is thus insisted that the change made in 1893, by striking out the word "inhabitant" and inserting in lieu thereof the word "citizen," was made to meet this situation. It is claimed that, under this con-

struction, a rule of taxation is provided which is not uniform, as it does not operate upon all of this kind of property alike, and whether it is taxable or not depends upon who is the owner of it. It is claimed that the statute does not provide that all foreign stocks shall be taxed; that it provides only for the taxation of stocks owned by citizens of the state.

²⁹ We think this contention has no force, and that it does not accord with the plain provisions of subdivision 9. We think the legislature intended to use the word "citizen" as synonymous with "inhabitant" or "resident." As was said in *McKenzie v. Murphy*, 24 Ark. 155, 159: "The word 'citizen' is often used in common conversation and writing as meaning only an inhabitant, a resident, of a town, state, or county, without any implication of political or civil privileges."

In *State v. Trustees of Delhi Township*, 11 Ohio, 24, 27, it was said: "Here a question is raised as to the meaning of the word 'citizen' as used in this connection. That this word does not always mean one and the same thing is clear. Thus we speak of a person as a citizen of a particular place, when we mean nothing more by it than that he is a resident of that place. When we speak of a citizen of the United States, we mean one who was born within the limits of, or has been naturalized by the laws of, the United States. It can hardly be believed that the legislature, in using the word 'citizen' in this statute, intended to make a distinction between native or naturalized citizens and resident aliens."

We think it was not intended by the legislature to limit the word to persons who are actually citizens in a political sense. A liberal construction must be given to the tax laws for public purposes. Mr. Justice Grant said in *Auditor General v. Hutchinson*, 113 Mich. 245, 71 N. W. 514: "Tax laws should be liberally construed": See, also, *United States v. Hodson*, 10 Wall. 395; *United States v. Taylor*, 104 U. S. 216.

3. One other question is raised. It is claimed that the taxation of relator's stock is in contravention of section 1, article 4 of the constitution of the United States, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." This contention cannot be sustained. In *Bonaparte v. Tax Court*, 104 U. S. 592, the question the court was asked to decide was whether the ³⁰ registered public debt of one state, exempt from taxation by the debtor state, or actu-

ally taxed there, was taxable by another state, when owned by a resident of the latter state. The court said: "We know of no provision of the constitution of the United States which prohibits such taxation. . . . It is insisted, however, that the immunity asked for arises from article 4, section 1 of the constitution, which provides that full faith and credit shall be given in each state to the public acts of every other state. We are unable to give such an effect to this provision. . . . While the constitution of the United States might have been so framed as to afford relief against such a disability, it has not been, and the states are left free to extend the comity which is sought, or not, as they please."

It was further remarked in the case that: "No state can legislate except with reference to its own jurisdiction. One state cannot exempt property from taxation in another."

In *Bradley v. Bauder*, 36 Ohio St. 28, 36, 38 Am. Rep. 547, it was said: "The constitutional power to tax shares of stock owned by our citizens in corporations located without the state does not depend on whether the capital of the corporation is or is not taxed in the state where the corporation is created. The power is the same whether the capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the constitution would be made to depend upon the operation of laws of a foreign jurisdiction—a proposition so obviously ill-founded that the moment it is stated its falsity becomes apparent." See, also, *Dwight v. Mayor etc. of Boston*, 12 Allen, 316, 90 Am. Dec. 149, where the same doctrine is laid down.

Cooley, in his work on Taxation, lays down the same rule. He says: "The shares owned by residents in foreign corporations may be taxed to the owners, even though the corporations themselves are taxed in the jurisdiction where their operations are carried on": Cooley on Taxation, 2d ed., 57.

³¹ The writ must be denied.

Montgomery, C. J., Hooker and Moore, JJ., concurred with Long, J.

Mr. Justice Grant Dissented. He referred to the provision of section 11 of article 14 of the constitution of Michigan, that "the legislature shall provide a uniform rule of taxation, except on property paying specific taxes; and taxes shall be levied on such property as shall be prescribed by law"; and asked the question whether the taxes here assailed could be sustained under this provision of the constitution. He declared that double taxation was unequal

taxation under that constitution; that the taxation of the property of a corporation and of its capital stock at the same time was double taxation, forbidden by law: Citing *Frederick County Commrs. v. Farmers' etc. Bank*, 48 Md. 117; *Kimball v. Milford*, 54 N. H. 406; *People v. Commissioners*, 4 Hun, 595, 62 N. Y. 630; *Attorney General v. Sanilac County Commrs.*, 71 Mich. 26, 38 N. W. 642. The judge then proceeded to consider the authorities cited in the opinion of the majority of the court, and declared them to be inapplicable to the case before the court.

The *Situs* of Stock for the Purpose of Taxation is discussed in the monographic note to *Buck v. Miller*, 62 Am. St. Rep. 458, 459. A share of stock is personal property, and is taxable to the owner at the place of his residence, whether the corporation is foreign or domestic: *Greenleaf v. Board of Review*, 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295. The capital stock and the shares of stock in a corporation are distinct subjects of taxation: *Commonwealth v. Charlottesville etc. Loan Co.*, 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364. And stock in a foreign corporation may be taxed to the resident owner, although the capital of the corporation is taxed where it is located: *Bradley v. Bauder*, 38 Ohio St. 28, 38 Am. Rep. 547. A state may tax the stock of a domestic corporation owned by aliens at a higher rate than that owned by resident stockholders: *State v. Travellers' Ind. Co.*, 70 Conn. 590, 66 Am. St. Rep. 138, 40 Atl. 465.

The Words "Residence," "Inhabitaney," "Citizenship," and "Domicile," are, generally speaking, synonymous terms: See the monographic note to *Berry v. Wilcox*, 48 Am. St. Rep. 711.

DAVIS v. TEACHOUT.

[126 Mich. 135, 85 N. W. 475.]

SECONDARY EVIDENCE OF A WRITING VOLUNTARILY DESTROYED may be received, if it was destroyed when none of the parties thought it necessary to preserve it, and there is no suspicion of fraud against the party seeking to put it in evidence. (p. 532.)

CONTRACT, CONSIDERATION FOR FORBEARANCE.—An agreement between a debtor and creditor that if the latter will wait until the death of the former, he shall then be well paid and also paid for waiting, is, if accepted and acted upon by the creditor, based upon sufficient consideration, and therefore valid. (p. 534.)

THE STATUTE OF LIMITATIONS AS AGAINST A DEMAND WHICH A DEBTOR AGREES TO PAY AT OR UPON HIS DEATH cannot commence running in his lifetime. The result is the same if the demand was at first enforceable at once, but the parties substitute for it an agreement that it shall be paid after the death of the debtor. (p. 534.)

PRACTICE.—**SPECIAL QUESTIONS** need not be submitted to the jury upon immaterial, inconclusive, or admitted matters, nor when the answer cannot affect the result. (p. 534.)

Claim against the estate of M. G. Teachout, deceased. It was disallowed and the claimant appealed to the circuit court, where a judgment was given in his favor, and thereafter defendant appealed to the supreme court.

W. D. Fuller, for the appellant.

Frankhauser & Cornell and W. H. Haggerty, for the appellee.

¹³⁶ HOOKER, J. Claimant's wife and Miles G. Teachout were children of Jacob Teachout. The evidence tended to prove that Miles G. Teachout made a contract with his father many years ago to furnish him an adequate maintenance for life, and that afterward, finding it inconvenient to have him in his family, he engaged the claimant to support him, promising to pay him well for doing so. This was about 1870. The claimant performed the service until 1876, when Jacob Teachout died, claimant having ¹³⁷ supported him two hundred and eighty-three weeks. Miles and the claimant then had an interview, in which Miles admitted his obligation to pay, but he did not want to pay then. Miles told claimant that he had a good deal of property, and not an heir in the world, and that, if he would wait until the final disposition of his property, he would see that he was well paid, and well paid for waiting. Claimant consented to do so. Miles died in 1898, without having paid anything, and the claimant filed his claim in probate court for fourteen hundred and thirty-eight dollars and sixty-five cents including interest. The claim was disallowed by commissioners, but upon appeal a verdict was obtained for fifteen hundred and fifty-seven dollars, and the defendant has brought the case here by writ of error.

It appeared upon the trial that the arrangement between Miles and his father was made in New York, and that it was in writing, and that Miles did support his father in his family for many years. These facts do not appear to have been disputed by any evidence. There was proof tending to show that the contract was burned, together with a lot of notes held by Jacob Teachout against his children, on an occasion when claimant was present, and with the assent of all parties; and it was contended that under such circumstances it was not competent to give secondary evidence of the contract. We think otherwise. Miles himself destroyed the instrument—if it was destroyed—at a time when none of the parties had reason to

think it necessary to preserve it. If it was not destroyed, it was lost. There is no suspicion of fraud on the part of claimant in the matter, and the case should not be ruled by *Shouler v. Bonander*, 80 Mich. 531, 45 N. W. 487, cited by counsel.

"It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made by the owner, or with his assent, as in the present case, the admissibility of the evidence will depend upon the cause or ¹³⁸ motive of the party in effecting or assenting to the destruction. The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes, which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and, unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is, then, the controlling fact which must determine the admissibility of this evidence in such cases": *Bagley v. McMickle*, 9 Cal. 430.

Considerable testimony was given concerning the terms and consideration of this original contract, but its materiality consisted only in its tendency to explain and render probable the theory of one or the other party in the case. Miles Teachout's obligation was an underlying fact, pertinent to the subject, but not necessary to the validity of a promise to pay Davis if he would support Jacob Teachout, though, under the theory of defendant's counsel, the claim as filed asserted that claimant carried out such original contract, and it was therefore necessary to prove such obligation. We look upon this as technical; but it is unimportant, for it was conclusively

proved that Miles contracted to support his father. But it is not consistent with a claim that the contract was immaterial. Much of this testimony was of little importance to the real dispute; but it was explanatory, and counsel might well think it prudent to introduce it for the consideration of the jury. The court instructed the jury that the important question was whether the contracts were made between Miles and the claimant, and that, if they found such contracts were made, the terms of the original contract were not very important, so long as it bound Miles to support his father for life.

It is clear that the case rested and turned upon an alleged agreement by Miles to pay at death, and added compensation for claimant's waiting. This was a valid arrangement, and leaves no ground for the claim that the statute of limitations bars the obligation. A new contract was substituted for the first one made between Miles and claimant, and as to that the statute has not yet run. Counsel strenuously urges that this was not a valid contract, and that there was no forbearance to sue, because there was no threat to sue. It seems to us elementary that an agreement to defer the time of payment, upon a promise to pay for the waiting, is based upon a valid consideration.

Again, it is claimed that the contract to support Jacob Teachout was made by the claimant and his wife. The only evidence tending to prove this was admissible only by way of impeachment, and while it perhaps tended to discredit Mrs. Davis, it was not affirmative evidence of the fact. The submission of special questions was properly refused. It is not error to refuse to submit special questions upon immaterial, inconclusive, or admitted matters. Nor is it when the answer cannot affect the result.

A few other questions have been reviewed, but we find no error in them.

The judgment is affirmed.

The other justices concurred.

Secondary Evidence of a Writing which has been lost or destroyed by accident is admissible: *Potter v. Adams*, 125 Mo. 118, 46 Am. St. Rep. 478, 28 S. W. 490. See, also, *Goldberg v. Ahnapee etc. Ry. Co.*, 105 Wis. 1, 76 Am. St. Rep. 899, 80 N. W. 920. But such evidence of the contents of an instrument is not admissible, unless the failure to produce the instrument itself is accounted for: *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627, 4 Am. St. Rep. 776,

4 S. W. 5; Phoenix Assur. Co. v. McAuthor, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903. And the due execution and genuineness of the alleged lost paper must also be shown: Helton v. Asher, 103 Ky. 730, 82 Am. St. Rep. 601, 46 S. W. 22.

The Statute of Limitations begins to run against an action from the time the cause thereof accrues: Ganser v. Ganser, 88 Minn. 199, 85 Am. St. Rep. 461, 66 N. W. 18.

Forbearance to Sue as a Consideration to support a contract is discussed in the monographic notes to Prater v. Miller, 60 Am. Dec. 524-527; Staver v. Missimer, 36 Am. St. Rep. 145-149. See, also, Haskell v. Tukesbury, 92 Me. 551, 69 Am. St. Rep. 529, 43 Atl. 500.

HAPEMAN v. CITIZENS' MUTUAL FIRE INSURANCE COMPANY.

[126 Mich. 191, 85 N. W. 454.]

INSURANCE OF LIVESTOCK IS NOT RESTRICTED TO THEM WHILE ON THE FARM OF THE ASSURED under a policy describing the property as livestock, carriages, and farm implements situated on section 5 of a designated township, but adding "stock insured against lightning anywhere in Kent, Allegan, and Ottawa counties." (p. 535.)

INSURANCE OF LIVESTOCK AGAINST LOSS BY LIGHTNING includes their loss through the burning of buildings immediately caused by lightning. (p. 535.)

Assumpsit against the defendant insurance company to recover for the death of horses. One of the provisions of the policy was as follows: "Livestock, carriages, harnesses, and farming implements, two hundred dollars. Stock insured against lightning anywhere in Kent, Allegan, and Ottawa counties. Situated in Allegan county, Michigan, on section 5, in the township of Heath." The plaintiff was away from his own premises over night. During that time his horses were kept in a barn which, it was claimed, was struck by lightning, and thereby immediately set on fire, and it and the horses therein were destroyed. Verdict for the plaintiff and the defendant moved for a new trial, which, being denied, he appealed.

Taggart & Taggart and F. H. Williams, for the appellant.

Wilkes & Hoffman, for the appellee.

¹²² GRANT, J. 1. It is first urged that the insurance upon the property in question did not extend beyond the farm.

Counsel for defendant say: "It [the policy] does not describe any one article, animate or inanimate, that from the description could be identified, other than by its location upon plaintiff's farm."

We find no reason in this contention. The term "livestock" includes horses, which are found on every farm in Michigan. To sustain defendant's contention would result in negating that provision of the policy expressly insuring such stock against lightning anywhere in the three counties named.

2. It is urged that if the horses were destroyed by fire resulting from the lightning, and were not killed by a direct stroke of lightning, defendant is not liable. An instruction to this effect was refused, the court holding that if the horses were destroyed by fire which was immediately caused by the lightning, or by the lightning itself, defendant was liable. The instruction was correct. The policy included loss from lightning, whether the horses were killed by the lightning, or by a fire the immediate result of the lightning. This policy permitted and covered insurance upon the livestock when in legitimate use in any part of the territory covered by the policy. It is common for parties driving in the public highway, when overtaken by a storm, to drive into sheds or barns for temporary protection. It is common for ¹⁹³ farmers to exchange work, and also for a farmer to hire out with his team to work for other farmers. The policy contemplates that stock thus situated is within its protection. In most cases, where such buildings are struck by lightning and a fire immediately follows, it would be impossible to tell whether the animals were killed by the lightning or by the fire resulting. Neither the statute under which the defendant was organized, nor the terms of the policy, contemplate that, under such circumstances, a party injured must show that the animals were killed by lightning.

Judgment affirmed.

The other justices concurred.

The Risk Assumed by Insuring Horses described as located on a certain section of land, which is the farm of the insured, is not limited to the use of the horses on that section, if there is no express provision in the policy so limiting their use. If the assured, while hauling grain to market, puts his horses in a hotel barn where one of them is destroyed, the insurer is liable for the loss: *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa, 494, 95 Am. Dec. 748.

PEERLESS MANUFACTURING COMPANY v. BAGLEY.

[126 Mich. 225, 85 N. W. 568.]

INDEPENDENT CONTRACTORS—LIABILITY FOR NEGLIGENCE OF.—ONE WHO OWES AN ABSOLUTE DUTY to another cannot acquit himself of liability by delegating that duty to an independent contractor. (p. 539.)

LANDLORD AND TENANT—LIABILITY OF THE FORMER FOR THE ACTS OF AN INDEPENDENT CONTRACTOR.—If a landlord undertakes to make improvements and repairs for his tenant, he cannot relieve himself of the consequences of negligence by employing an independent contractor. Therefore, if a landlord agrees with his tenant to put in the leased building an automatic system for extinguishing fires, and the landlord, being himself inexperienced, employs an experienced independent contractor, who, by his negligence, uses sprinkler heads designed to fuse at too low a temperature, and the tenant is subsequently injured by their so fusing, the landlord is liable to the tenant for the loss. (pp. 539, 540.)

Action by tenants against their landlord for damages suffered from negligence in the construction of a sprinkler system on the leased premises. The defect in the system was that the sprinkler heads were intended to fuse at 155° Fahrenheit, and did fuse on a hot day at a temperature not quite that high, whereby the premises occupied by the tenants were flooded with water and their goods therein injured. Plaintiff was inexperienced, but employed an experienced contractor of good repute. The testimony received at the trial established:

1. That the relation of landlord and tenant, and no other, existed between the parties.

2. That there was no written lease, whether or not there was an agreement for one.

3. That there was no covenant forming part of the oral agreement for leasing that the premises were free from defects and fit for use, or that the landlord would keep them in repair and fit for use; that that oral agreement was simply that the plaintiff should occupy the premises for a certain period at a certain rental.

4. That an agreement—which, if plaintiff's testimony is believed, was, in effect, a part of the agreement as to tenancy—was made by defendants, at the instance and for the benefit, at least in large part, of plaintiff, that there should be installed upon the demised premises a sprinkler system like that about to be installed in Burnham, Stoepel & Co.'s premises, and that

this agreement was, without damage to plaintiff, performed as early as the September following the May or June which was the date of plaintiff's entry upon the premises demised to it.

5. That from September, 1896, to July, 1897, the sprinkler head had been part of the demised premises, which were in the actual occupancy of the plaintiff.

6. That defendants had no notice of any defect in the sprinkler head up to the time of the accident.

7. That the defendants did not plan, or by their servants install, the sprinkler system, but that they committed the whole work of installation, including planning, labor, and material, to the General Fire Extinguisher Company, under a clear and distinct contract; that that company is an experienced, competent, and reputable concern in its line of business; that defendants did not interfere with, or exercise supervision over, the work of installing, but left the work wholly in the hands of the extinguisher company.

8. That the work was inspected by an experienced insurance inspector before reduced insurance rates on the building and stock were procured.

9. That it is proper practice to put sprinkler heads in skylights.

10. That the extraordinary heat of the sun on July 4, 1897, caused a head in the skylight to open, which, under ordinary circumstances, remained closed.

11. That, if such opening is due to the fault of any one, it is to the fault of the General Fire Extinguisher Company.

The court instructed the jury that the fact that the defendant "had used all ordinary precaution in employing suitable people to put this system in, and letting the contract to a reputable concern to put it in, was of itself no defense against the action in this case." The jury found that the apparatus was negligently constructed, and returned a verdict for the plaintiff.

Wells, Angell, Boynton & McMillan, for the appellants.

Mayburg & Lucking, for the appellee.

228 GRANT, J. It appears conceded that there was evidence of negligence on the part of the General Fire Extinguisher Company in putting in the sprinkler heads in the skylight arranged to fuse at 155°. That temperature proved too low.

They should have been arranged to fuse at a higher temperature. The sprinkler plant was installed in September. In the following July, with a temperature outside at 94°, one of the sprinkler heads fused. A few days afterward the remaining sprinkler head, when the temperature outside was about the same, fused when the temperature in the skylight had reached 146°. It was undoubtedly assumed, on the part of the agents of the extinguisher company, that the temperature within the skylight would not reach that degree; but they made no effort to determine the degree of temperature of the skylight in hot weather. If they relied upon experiences elsewhere, it is not shown upon this record. An experienced witness for the defendants testified that they should be set with a leeway of about 30°, and that he would not locate a 155° sprinkler head at a place where he knew the temperature would reach over 135°. We must, therefore, enter upon a determination of the defendants' liability with the fact established that their contractor, the extinguisher company, was guilty of negligence.

It is also established that the defendants had had no experience ²²⁰ with, or knowledge of, the construction of the sprinkler apparatus; that they employed a standard company of long experience and of good reputation, and that the system was one in common use. They had, therefore, exercised that prudence which the law requires in choosing independent contractors, and no negligence is directly attributable to defendants. It was to the interest of the defendants, as well as that of the plaintiff, to have a proper apparatus supplied. In case of flooding, both would be damaged.

Did the employment of such a contractor relieve the defendants from liability to plaintiff? They insist that it did; that the case is within the rule that, when one employs a competent, experienced, and independent contractor to do a lawful work, he is not liable, either for defects in the system or in the apparatus or machinery. The learned counsel cite *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *King v. New York Cent. etc. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692, 32 N. E. 1052; *McCafferty v. Spuyten-Duyvil etc. R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *Miller v. New York etc. R. R. Co.*, 125 N. Y. 118, 26 N. E. 35. None of those cases involve the relation of landlord and tenant. They are cases coming clearly within the rule as to nonliability for the negligence of inde-

pendent contractors. There is, however, another rule, and which may be called an exception to that above stated, viz., that, where one owes an absolute duty to another, he cannot acquit himself of liability by delegating that duty to an independent contractor. To apply the rule to the present case, it may be thus stated: Where a landlord undertakes to make repairs or improvements for his tenant, he cannot relieve himself of the consequences of neglect in the performance of his agreement by employing an independent contractor. Thus, where a landlord undertook to put a new roof on the building of his tenant, and he let the contract to an independant contractor to perform the work, and the goods were damaged by rain through the negligence of ²⁸⁰ the contractor, the landlord was held liable: *Wertheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824. Where the landlord made repairs, and a joint of pipe was improperly constructed, whereby the water flowed from the roof through onto the plaintiff's goods, the landlord was held liable: *Worthington v. Parker*, 11 Daly, 545. Where a drain had been constructed by an independent contractor, and after its acceptance the water flowed through it into an adjoining cellar, through the negligence of the contractor, the owner of the building was held liable: *Sturges v. Theological Society*, 130 Mass. 414, 39 Am. Rep. 463. A landlord assuming to make repairs, though not required to do so by his lease, is responsible for his lack of skill in making them: *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108.

Plaintiff had agreed with defendants that they should put in a sprinkler system. They could adopt whatever system they chose, and could make whatever contract they chose for putting it in. There was no contractual relation between plaintiff and the General Fire Extinguisher Company. We think that in reason, as well as authority, the rule of the law is that the plaintiff can hold defendants for the negligence resulting in damage to it, and that the defendants have their remedy against the extinguisher company.

Counsel liken the case to that of one buying an appliance of a reputable dealer, which, through its negligent construction or make, works damage to a third person, and invoke the rule that a vendor or purchaser is not liable for latent defects in machinery: Citing *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221, 60 N. W. 472; *Walden v. Finch*, 70 Pa. St. 460, and other cases. We think this is not a case for the applica-

tion of that doctrine. There was no defect here in the system or in the apparatus. The former was good, and the latter properly constructed. There was no latent defect. The sole difficulty was that the extinguisher company erred in not ²³¹ determining the temperature at which the sprinkler head should be set. *Walden v. Finch*, 70 Pa. St. 460, was a case between bailor and bailee. The bailor had deposited his property in the warehouse of the bailee. The building fell through improper construction. It was held that the bailee, having done all in his power to erect a safe structure, was not liable for its occult defects. *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221, 60 N. W. 472, involved the shaft of an engine, which broke from hidden and unknown defects.

Judgment affirmed.

The other justices concurred.

Independent Contractor.—A landlord in making repairs and improvements upon the demised premises cannot absolve himself from the duty of exercising reasonable care by placing the work in the hands of an independent contractor. He is liable, if the tenant suffers injury because of a defect occurring during the progress of the work, through the negligence of an independent contractor: See the monographic note to *Covington etc. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 423, on the liability for the torts and negligence of independent contractors.

COUNTY OF WAYNE v. REYNOLDS.

[126 Mich. 231, 85 N. W. 574.]

SUPERVISORS—ALLOWANCE OF CLAIMS BY, WHEN VOID.—If a statute prescribes the salary of a county clerk, and declares that he shall not be allowed any additional sum for new duties, and that he must perform all duties which the board of supervisors may require, a resolution of that board awarding him compensation for his services as clerk of one of its subcommittees is ultra vires and void. (p. 543.)

SUPERVISORS—RECOVERY OF CLAIMS UNLAWFULLY ALLOWED BY.—If a board of supervisors allows a claim which cannot constitute a charge against the county, such allowance is void; and if the claim is paid, an action may be sustained by the county to recover the amount of such payment. (pp. 544, 547.)

Assumpsit to recover moneys paid to the defendant as extra compensation for his services while clerk of the plaintiff county. Judgment for the defendant on a verdict directed by the court, and the plaintiff brings error.

Allan H. Frazer, prosecuting attorney, and Ormond F. Hunt, assistant prosecuting attorney, for the appellant.

Jasper C. Gates, for the appellee.

²³² HOOKER, J. The defendant was the clerk of the county of Wayne, and during the time that he was such clerk he was appointed secretary of a committee of the board of supervisors having in charge the erection of a courthouse for the county. His appointment was under the following resolution:

"Resolved, that Henry M. Reynolds be, and he is hereby, appointed secretary of the committee on public buildings during the erection and completion of the new Wayne county building, to the end of the fiscal year."

About four months later the board passed the following resolution:

"Resolved, that the county auditors be, and they are hereby, instructed to pay Henry M. Reynolds the sum of twenty-five dollars per month for the time he has acted as secretary of the committee on site and public buildings; and be it further

"Resolved, that the county auditors be, and they are hereby, instructed hereafter to pay the secretary of said committee the sum of twenty-five dollars per month during the term of the committee."

Other similar resolutions of later date, covering other periods, appear. Mr. Reynolds performed the services, and received from the board of auditors of the county the sum of five hundred and twenty-five dollars for such services. This is an action brought ²³³ by the county to recover from the defendant this sum, with interest. The circuit judge directed a verdict for the defendant, and the plaintiff has taken a writ of error, upon which the case is before us.

There are two questions: 1. Was he lawfully entitled to such compensation? 2. Was the action of the board in making payment conclusive and final?

The following sections of the statutes are cited as bearing upon this controversy:

Act No. 425, Local Acts of 1895, provides: .

"Section 1. That the county clerk of the county of Wayne shall receive a salary of three thousand five hundred dollars per annum; and that the said salary of said county clerk shall be full payment for services performed by said officer for said county, or for the

patrons of [his] office, and shall be in lieu of all fees, commissions, or perquisites payable to said officer under the laws of this state for the performance and discharge of any duties required by [his] office, or any office the duties of which [he] exercises by virtue thereof, and in lieu of all fees or commissions collectible by said officer for the performance of the respective duties of [his] said office where the said fees are not fixed by law; and that said officer shall receive no other or further compensation for the duties imposed upon [him], but all fees or commissions made payable to or that may be charged by [him] by virtue of said office shall be received by and on account of said county.

"Sec. 2. No officer whose salary is fixed by this act shall be entitled to any fees, commissions, or added compensation by reason of any new duties hereafter added to the office held by him.

"Sec. 3. The said county clerk of Wayne county shall receive or collect no other compensation, except the salary above provided, for the performance or discharge of any of the duties of [his] office, but [he] shall pay the fees, commissions, or charges provided by law to be paid, or that [he] may fix or charge, for the performance or discharge of such duties, or any duties in [his] said office, to the county treasurer, on the last Saturday of every month, and the same shall be for the use of said county, and placed to the credit of the general fund."

²³⁴ Section 2477 of the 1 Compiled Laws of 1897, provides: "The county clerk of each county, or in his absence his deputy, shall be the clerk of the board of supervisors of such county. It shall be the duty of such clerk: 4. To preserve and file all accounts acted upon by the board, and on no account to allow such accounts to be taken from his office. 6. To perform such other and further duties as such board may, by resolution, require."

Section 6, article 10 of the constitution of Michigan, provides: "A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law."

Section 38, article 4 of the constitution of Michigan, provides: "The legislature may confer upon the board of supervisors of the several counties such powers of a local, legislative, and administrative character as they may deem proper."

The authority of the board of supervisors of the county of Wayne in the matter of the erection of this courthouse was settled in the case of Board of Auditors etc. v. Carpenter, 114 Mich. 44, 72 N. W. 19. In doing this work the board of supervisors availed itself of the services of a subcommittee and the county clerk, as we have seen. We cannot say that the clerk was not required by law to perform this service, as required under the sixth subdivision quoted. He clearly was, and, that being so, the law expressly denies his right to compensation over and above his salary therefor: Ewing v. Ainger, 96 Mich. 587, 55 N. W. 996; Hewitt v. White, 78 Mich. 117, 43 N. W. 1043; Plummer v. Township of Edwards, 87 Mich. 621, 49 N. W. 876; Board of Managers etc. v. Auditor General (decided December 4, 1900, without opinion). The statute cited not only fixed the compensation of the clerk, but expressly forbids the payment or reception of any further sum for the duties imposed upon him by law. Rectitude of intention ²³⁵ upon his part and that of the auditors does not change the character of the transaction, which is ultra vires.

A somewhat similar question arose in the case of American Steamship Co. v. Young, 89 Pa. St. 191, 33 Am. Rep. 748, and the right to recover back money was asserted and sustained in favor of a private person against an officer who took illegal fees.

The case of County of Allegheny v. Grier, 179 Pa. St. 639, 36 Atl. 353, was much like the present case. It was said: "Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer to a suit brought by a trustee to recover private trust funds that he had been a party to the devastavit. . . . With much the stronger reason is this doctrine applicable where the interests of the whole people are involved. . . . It is obviously immaterial whether the illegal payment be through design or mistake."

In Virginia, the attorney general claimed and was allowed and paid extra compensation, and it was recovered back by the state in an action brought for the purpose: Commonwealth v. Field, 84 Va. 31, 3 S. E. 882.

Story says: "If an agent pays money for his principal, by mistake or otherwise, which he ought not to have paid, the agent, as well as the principal, may maintain an action to recover it back. . . . If an agent pays money under a mis-

take of fact for the principal, the latter may recover it back from the party who has received it; and, if it be paid under a mistake of the legal obligation of his principal, it may be recovered back": Story on Agency, 6th ed., secs. 398, 435. See, also, *Stevenson v. Mortimer*, Cowp. 805.

"The act of the agent is not considered as the act of the principal except when it is within the limits of his authority. . . . But however it may be when the money is paid by the supposed debtor, no case has gone so far as to decide that an unauthorized payment by an agent, from an erroneous opinion of the legal obligation of his principal, shall be binding on the principal, and ²³⁶ that he cannot recover back money thus unduly paid": *United States v. Bartlett*, 2 Ware, 24, 27, Fed. Cas. No. 14,532.

We do not lose sight of a substantial difference between the case of money paid by an officer, such as a treasurer, in the routine of his office, and money paid upon warrant after allowance by a board authorized to adjudicate upon claims, and from whose determination the law forbids an appeal, like the board of supervisors in other counties, and the board of auditors in Wayne county. As has been held in the case of *Advertiser etc. Co. v. City of Detroit*, 43 Mich. 116, 5 N. W. 72, where such a board has once passed upon a claim which it had authority to pass upon, it cannot be reviewed, and money paid upon such adjudication cannot be recovered back in an action upon the ground that the charge was excessive. To permit it would be to reopen every case where an excessive allowance had been made for services rendered, and for which there is an obligation to pay something. We have found no case which precludes such recovery when a board has allowed a claim which was wholly fictitious or expressly forbidden by law, and, with one or (possibly) two exceptions, the same may be said of claims which the law does not recognize as lawful charges against the municipality.

Our law prescribing the duty of boards of supervisors is taken from New York, where similar duties and powers are imposed and granted. It has never been held in that state that money once allowed and paid could not be recovered back in a case where the law did not recognize the claim allowed as one that could be a proper charge against the county. Thus, in the case of *Board of Supervisors v. Ellis*, 59 N. Y. 620, it was held that a board of supervisors had no power to audit and allow an account not legally chargeable to the

county, and that if they did, and it was paid, such payment was not voluntary, and that an action lay to recover back the money paid. The case was much like the present one in all of its features. Folger, J., said:

237 "Doubtless, if a board of supervisors at one time acts finally upon a matter of which they have jurisdiction, and as to which they have a lawful right to act, a succeeding board may not undo what they have done, to the immediate detriment of third parties. . . . A board of supervisors has no power to audit and allow accounts not legally chargeable to their county, and, if it attempts so to do, it is an act in excess of jurisdiction, done without the power to make it valid, and is null and void": See, also, *Smith v. City of Newburgh*, 77 N. Y. 130.

A more recent case contains an elaborate discussion of this subject. Under a law which permitted the issue of bonds for the raising of funds to build waterworks, but which forbade their sale at less than par, a contract was made which was ultimately held to be within the prohibition. The water board undertook to compromise this matter, and the court held that it was outside of their jurisdiction. Mr. Justice Vann said: "The statute forbade the payment from the funds of the water board, and action forbidden by statute is void. A void act is no act, and a void payment is no payment. Such a payment is not voluntarily made by the corporation, but by its agent, in excess of his authority and in defiance of its rights. It is not the act of the corporation itself, but of one who without authority assumed to act for it. . . . It is a matter of grave public concern to protect municipal corporations from the unauthorized and illegal acts of their agents in wasting the funds of the taxpayers. It is only with the utmost difficulty that municipal officers and agents can be kept within the bounds of their authority now; but once let it go forth as the settled law of the state that an illegal contract can become the basis of a lawful compromise entered into between the contractor and an agent guilty of the illegal action, and a new door will be open to municipal spoliation. If a paving contract is let to the highest instead of the lowest bidder, in violation of a statute requiring competition, a compromise with the contractor, followed by payment of a gross sum equal to all the profits that he could have made on the contract if executed, should not enable him to keep the spoils and defy the public. Sound public

policy will not permit the courts to countenance this dangerous method of evading a ²³⁸ statute, for it will always be done under the claim of good faith, and the fraud beneath will be hard to discover": Village of Ft. Edward v. Fish, 156 N. Y. 363, 374, 50 N. E. 973. See, also, Ellis v. Board of State Auditors, 107 Mich. 536, 65 N. W. 577.

Counsel cites two Michigan cases which are said to be opposed to this doctrine. One is Advertiser etc. Co. v. City of Detroit, 43 Mich. 116, 5 N. W. 72; the other, County of Wayne v. Randall, 43 Mich. 137, 5 N. W. 75. In the former the claimant had a valid claim, but was allowed more than the statutory price for the work. It was claimed that as to this excess the action was void, and that the amount should be recoverable in an action by the city. It was held otherwise. In the Randall case, Randall, as circuit court commissioner, had charged against the county certain fees in a fraudulent debtor proceeding prosecuted before him. The board of auditors took advice and allowed his claim, and afterward an action was brought to recover back the amount. It was held not recoverable. The only possible distinctions between these two cases and the present case are that in one the entire claim was not invalid, and that in the latter the claim was for services not a lawful charge against the county, while in the present case the statute expressly forbids payment beyond the salary provided. We think both cases are inconsistent with the doctrine announced in the cases hereinbefore cited. If the circuit court commissioner's fees were not a proper charge against the county, the board had no just reason for allowing them; and, also, if the statute fixed a limit to the price paid for printing, it had no just reason for allowing double price, or, what was equivalent, double measure. But if it be said that the last case is distinguishable, and was one where the board had jurisdiction to allow some part of the claim, that cannot be said of the Randall case; for he had not rendered any services for the county for which the county was in any way or to any extent liable, or for ²³⁹ which the board had any authority to pay, unless it is to be said that it has jurisdiction to hear and unalterably determine, by allowance or disallowance, any kind of a claim that may be set up, not expressly prohibited by law. In the case now before us the prohibition is positive; in the other it is negative; and we see no difference in principle. Unless we are to follow these cases, we must overrule the later, if not the earlier as well, on

make a distinction where there is no substantial difference. We all are of the opinion that the Randall case should be overruled. It is not so clear that the other case should be, for there is force in the claim that the board had authority to determine the quantity of work done, and that its decision was final. As the case may fairly be distinguished from the present case and the Randall case, we leave it for further consideration when occasion may arise.

The judgment is reversed and a new trial ordered.

The other justices concurred.

The Allowance, by County Commissioners, of a claim not legally chargeable against the county, does not preclude the county from maintaining an action to recover the moneys so illegally allowed and paid: Board of Commrs. v. Heaston, 144 Ind. 583, 55 Am. St. Rep. 192, and monographic note, 41 N. E. 457, 43 N. E. 651.

RAY v. McDEVITT.

[126 Mich. 417, 85 N. W. 1086, 86 N. W. 543.]

A BOND OF INDEMNITY TO A SHERIFF TO PREVENT HIS LEVY OF AN EXECUTION is not against public policy nor void when the parties all act in good faith, and the validity of the writ depends on a new statute which has not been construed by the court, and there is an honest doubt of the right to make the levy. (p. 551.)

Charles A. Blair and Richard Price, for the appellants.

Wilson & Cobb, for the appellee.

418 LONG, J. Plaintiff brought this action as assignee of Charles C. Bloomfield, Theodore A. King, and Henrietta Watts, administratrix of the estate of John W. Watts, deceased, against the defendants, upon a bond of indemnity. The declaration alleges substantially:

1. The filing of an official bond by Mark H. Ray, as sheriff of Jackson county, with Charles C. Bloomfield, Theodore A. King, and John W. Watts as sureties.

2. The recovery by Zenas R. Wright, in the Jackson circuit court, of a judgment against Will Beach, John McDevitt, and Edward C. Morrissey, which judgment was on October 10, 1890, affirmed by the supreme court: Wright v. Beach, 82 Mich. 469, 46 N. W. 673.

3. The issuing of an execution upon such judgment, and delivery of the same to said Mark H. Ray, sheriff, wherein and whereby he was commanded that out of the goods and chattels of said Will Beach, John McDevitt, and Edward C. Morrissey, defendants, and for want thereof then of their lands and tenements, he should cause to be made the said damages and costs aforesaid.

4. That McDevitt and Morrissey, claiming that said judgment was against them as sureties on Beach's appeal bond, and that the execution was void as against them because the same was not issued seasonably, and within thirty days from the time when the same was legally issuable, notified the sheriff not to levy the same, and, for the purpose ⁴¹⁹ of avoiding a levy and testing the legality of the execution, gave to the sheriff an indemnity bond, which, after reciting the facts leading up to and including the delivery of the bond to the sheriff, reads as follows:

"Whereas, no property belonging to said defendant [Beach] can be found within said county, and said John McDevitt and Edward C. Morrissey, through their attorney, Richard Price, have notified Ray that he must not levy said execution upon the property of said sureties, because of the fact that the same issued more than thirty days from the time when the same was legally issuable, and the said sureties desire to test the legal right of said plaintiff to cause said execution to be levied upon their property:

"Therefore, the conditions of this obligation are such that, if the said John McDevitt and Edward C. Morrissey, shall well and truly keep and bear harmless and indemnify the said Mark H. Ray of and from all harm, let, trouble, damage, costs, suits, actions, judgments, and executions that shall or may at any time arise, come, or be brought against him for refusing to levy said execution upon the property of said sureties, then this obligation to be void; otherwise of force."

5. That, upon the execution and delivery of said bond, said Mark H. Ray, sheriff, returned said execution to said circuit court without having made the levy thereunder, and without collecting the damages and costs aforesaid, or any part thereof.

6. That said sheriff, Mark H. Ray, died; and after his death an action was brought against the sureties on his official bond, which, on the death of Watts, one of said sureties, was revived against Bloomfield and King, and judgment rendered against

them in the supreme court: *Wright v. King*, 107 Mich. 660, 65 N. W. 556.

7. That execution was issued on the last judgment, the amount of which was paid by Bloomfield, and Bloomfield and King became subrogated to all the rights of sheriff Ray under the indemnity bond.

8. That plaintiff reimbursed Bloomfield, and Bloomfield, King, and Henrietta Watts, administratrix of the estate of John W. Watts, assigned all their rights under said bond of indemnity to plaintiff.

9. That, by reason of the premises, plaintiff became entitled to maintain an action on said bond of indemnity against defendants for the recovery of the amount paid by him on said assignment.

The declaration also contains the common counts, but all claim under these counts was waived, and the right to recover based upon the special count.

Defendants demurred to this declaration on the grounds:

1. That the agreement to indemnify was illegal and void, as having for its object a violation of the public duty of the sheriff; 2. That the circuit court had no jurisdiction of the action; 3. That the agreement was not assignable in the manner set forth in the declaration, and plaintiff had no right of action thereon.

The demurrer was overruled in the court below, and judgment rendered for the plaintiff on said special count. Defendants bring error.

It is the claim of the defendants that the bond declared upon is void both at common law and under the Michigan statutes. A number of authorities are cited by counsel to sustain the proposition that an agreement by a third party to indemnify an officer for neglecting his duty in the service of process, being founded on an illegal consideration, is void at the common law. It is claimed, on the other hand, by counsel for plaintiff, that this case differs from those cited, in that the parties who entered into the agreement are the debtors, or parties against whom the execution in the hands of the sheriff ran, and that they were directly interested in preventing a levy upon their property. It is also contended by counsel for plaintiff that the cases cited by counsel as directly affecting the action of the sheriff relate to *capias*, or other process, by which the sheriff was directed to take the body of the debtor in execution; that the acts in these cases

were violations of the statutes which relate to the taking of the body of the debtor. The cases relied upon by defendants' counsel are: ⁴²¹ *Hodsdon v. Wilkins*, 7 Greenl. 113, 20 Am. Dec. 347; *Webber v. Blunt*, 19 Wend. 188, 32 Am. Dec. 445; *Placket v. Gresham*, 3 Salk. 75; *Scott v. Shaw*, 13 Johns. 378; *Denny v. Lincoln*, 5 Mass. 385; *Hinman v. Brees*, 13 Johns. 529; *Goodale v. Holridge*, 2 Johns. 193; *Packard v. Tisdale*, 50 Me. 376.

In most of these cases the illegal act complained of against the sheriff relates to his act in releasing a body execution, and it is well settled that in such cases the act is illegal and void as against public policy. We think, however, the rule is not strictly confined to cases where the sheriff has been directed to take the body of the debtor in execution. In the case of *Buffendean v. Brooks*, 28 Cal. 641, a bond taken by the sheriff to indemnify him from loss or damage by reason of his proceeding with the sale of certain goods and chattels was held void. The proofs in that case show, however, that, at the time the bond was delivered to the sheriff, he had notice that the judgment he was about to enforce by a sale of the chattels under the execution had been discharged by process of law, and also that an injunction was out against New, the plaintiff, restraining the sale. The sheriff, upon taking the bond of indemnity, proceeded with the sale notwithstanding the injunction of the court. The bond was held void by reason of the unlawful act of the sheriff in violating the injunction. The case was referred to by this court in *Klock v. Pack*, 112 Mich. 670, 71 N. W. 461, and in that case it was held that a bond given to a garnishee pending judgment in the principal suit, to indemnify him against harm and damage resulting from the immediate payment to the plaintiffs therein of a portion of a fund which, according to his disclosure in the case, he held as trustee for the principal defendant, was not void on the ground of public policy. The case was distinguished from the case of *Buffendean v. Brooks*, 28 Cal. 641.

We think the present case is plainly distinguishable from the cases cited by defendants' counsel. Here the bond was taken at the request of counsel for these very ⁴²² defendants. The case is not like one where the sheriff holds an execution by which he is directed to take the body of the debtor, or where he is proceeding in violation of an injunction, or some other order of the court. It appears here that the

sheriff was impressed with the idea, conveyed to him by Mr. Price, the attorney for the sureties, that the execution had been improvidently issued. Had that contention been sustained by this court, it would have appeared at once that the sheriff had no right to make the levy. There is no doubt but that all the parties were acting in good faith at the time, as no construction had then been given to that statute. We think it must be held, under these circumstances, that the taking of the bond was not against public policy, and was not in contravention of any statute of this state. This was not an illegal act, and the bond was given upon sufficient consideration to entitle the plaintiff under his assignment to maintain his action thereon.

The judgment below must be affirmed.

Moore, J., concurred with Long, J.

GRANT, J. I concur in the conclusion reached by my brother Long. The general rule is conceded that a bond of indemnity, taken by a sheriff to indemnify him for willful neglect of duty in the service of process of the court, is founded on an illegal consideration, and is void as against public policy, both at common law and under the statute of this state: 3 Comp. Laws 1897, sec. 11,332. To be void under the statute, and to subject the officer to the penalty therein provided, the neglect or refusal must be willful. It is also conceded that there are many cases where such acts are not held void as against public policy, and where such bonds of indemnity are sustained. When a party seeks to take advantage of his own act and of the act of an officer, done at his request and for his benefit, at his urgent solicitation and at the advice of his attorney, who is an officer of the court, the act done must be clearly shown to be "injurious to the public, or ⁴²⁸ against the public good." It was said in *Richardson v. Mellish*, 2 Bing. 229: "It [public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." Such a horse must be ridden with great care and discrimination.

The learned counsel for the appellants concede that there are exceptions to the rule. They say: "We are aware that an exception exists to the rule in that class of cases where

the act indemnified against is apparently right, and in the furtherance of a legal claim, and the party committing the act is ignorant of the fact that he is doing wrong; the distinction being that, if the act threatened or agreed to be done is known at the time to be wrongful, an express promise to indemnify is illegal, but, if this is not known at the time, and the act is seemingly lawful, the bond of indemnity is valid."

Mr. Price, who was the attorney for these defendants in the suit in which the execution was issued, advised the sheriff that the execution was void. The question had never been decided. It was doubtful. The court below held with the contention of Mr. Price, but that decision was reversed in this court. How can Mr. Price now contend that the "act indemnified against was not apparently right, and in the furtherance of a legal claim?" The sheriff was not a lawyer; Mr. Price was. Mr. Price informed the sheriff that he would be liable in damages if he made the levy. He was willing, therefore, under the advice of Mr. Price, to take a bond which would protect him, and also would insure the collection of the plaintiff's claim, if the court should decide against Price's contention. I think the case is clearly within the following decisions: *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Gleason v. Briggs*, 28 Vt. 135; *Randle v. Harris*, 6 Yerg. 508; *County of Strafford v. Jackson*, 14 N. H. 16; *Town of Stonington v. Powers*, 37 Conn. 424 439; *Joyce v. Williams*, Tayl. 27; *Foster v. Clark*, 19 Pick. 329. The sheriff acted in entire good faith, and so undoubtedly did these defendants and their attorney, Price. There has been no willful misconduct or bad faith on the part of anyone, unless it has been on the part of these defendants in now trying to avoid the consequences of the kindly act of the sheriff to benefit them. I think the case is clearly within the exception, and not within the rule.

Montgomery, C. J., concurred with Grant, J.

Hooker, J., Dissented. He maintained that a sheriff who contracted with an execution debtor to omit the service of the writ, and who accordingly omitted it, was guilty of a misfeasance of office, and that the contract was necessarily illegal and void, and that the law would decline to enforce it and would leave the parties where it found them; that this rule was not changed by the fact that one of the parties had profited by the arrangement. In support of his proposition that promises or bonds of indemnity to prevent the

sheriff from performing his duty were necessarily void, he cited *Blackett v. Crissop*, 1 *Ld. Raym.* 278; *Stotesbury v. Smith*, 2 *Burr.* 924; *Denson v. Sledge*, 2 *Dev.* 136; *James v. Hendree*, 34 *Ala.* 488; *Lake Fork etc. Commrs. v. People*, 138 *Ill.* 87, 27 *N. E.* 857; *Penn v. Bornman*, 102 *Ill.* 523; *Cole v. Parker*, 7 *Iowa*, 167, 71 *Am. Dec.* 439; *County of Cass v. Beck*, 76 *Iowa*, 487, 41 *N. W.* 200; *Kenworthy v. Stringer*, 27 *Ind.* 498; *Hodson v. Wilkins*, 7 *Greenl.* 113, 20 *Am. Dec.* 347; *Barnes v. Jackson*, 2 *Sneed*, 416; *Millard v. Canfield*, 5 *Wend.* 61; *Scott v. Shaw*, 13 *Johns.* 378; *Webber v. Blunt*, 19 *Wend.* 188, 32 *Am. Dec.* 445; *Harrington v. Comerford*, 61 *Mo. App.* 221; *Prewitt v. Garrett*, 6 *Ala.* 128, 41 *Am. Dec.* 40. He claimed that the cases cited as supporting the contrary proposition were inapplicable, and that all of them were made without any consideration or citation of authorities.

INDEMNITY TO SHERIFFS.

I. When Valid.

- a. Generally.
- b. Bonds Defectively Executed.
- c. Indemnity Against Acts Already Committed.
- d. Bonds not Signed by Principal.

II. When Void.

I. When Valid.

a. Generally.—“It must be remembered, in considering all contracts of indemnity, however expressed, that the law will not tolerate any agreement having for its object the commission of a known wrong. Hence it is essential to the validity of every bond or other agreement for indemnity that there was no doubt respecting the validity of the act in question, for if the parties knew, or were chargeable with knowledge, that it was criminal or unlawful, or necessarily constituted a trespass or an invasion of the just rights of another, there can be no contract, whether expressed or implied, that the agent shall by his principal be indemnified for doing such act”: 2 *Freeman on Executions*, sec 275a.

If the act threatened or agreed to be done is known at the time to be wrongful or unlawful, any promise of indemnity, whether express or implied, is illegal, but if this is not known at the time, and the act is seemingly lawful, the bond of indemnity is valid, or, in other words, if the act indemnified against is apparently right and in furtherance of a legal claim, and the officer is ignorant of the fact that he is committing a wrong, the indemnity is valid. Indemnity for acts apparently right, or not apparently wrong, is valid, where the means employed are not in themselves criminal and are not known by the officer employed to be wrongful, though they work a trespass on the rights of a third person: *Ives v. Jones*, 3 *Ired.* 538, 40 *Am. Dec.* 421.

The rule is well stated in *Stanton v. McMullen*, 7 Ill. App. 326, wherein it appeared that a sheriff was about to levy an execution on certain goods, and there being a reasonable doubt about their ownerships, the judgment creditor executed a bond of indemnity, agreeing to save the officer harmless from the consequences. The goods proved to be exempt, and a judgment was obtained against the sheriff for levying thereon. He brought an action on the bond and the defense was set up that such bond was void. The court, through Mr. Justice Pillsbury, said: "It is contended by the defendant in error, that at the time the bond was executed, the plaintiff in error knew that he would commit a trespass in selling the property, and therefore the bond is void, upon the principle that a promise to indemnify another for known acts of trespass cannot be enforced, as such contracts are contrary to public policy. This is undoubtedly a rule of the common law, where the proposed act is a palpable wrong, and so known to be by the parties at the time of the agreement to perform such act. But it is believed this rule has never been extended to cases where the parties, in the prosecution of their legal rights in good faith, have committed an unintentional wrong against another. We understand the rule to be limited to those cases where the intention is to commit a trespass, and does not include cases where the parties are actuated by honest motives in the assertion of what they believe to be their rights under the law, although it should subsequently transpire that they were not justified in doing the acts contemplated by them when the bond was executed. An examination of the evidence in this record fails to convince us that the parties to this bond were acting from any improper motive in proposing to levy upon and sell the property of the defendant in the execution": *Stanton v. McMullan*, 7 Ill. App. 329, 330.

If it is always borne in mind that the difficulty arises in determining what acts are and what acts are not unlawful, and that the solution of this question must depend upon the facts of each particular case, the quotation above is sustained by ample authority: *Moore v. Appleton*, 26 Ala. 633; *Stark v. Raney*, 18 Cal. 622; *Porter v. Stapp*, 6 Colo. 32; *Anderson v. Farns*, 7 Blackf. 343; *Jacobs v. Pollard*, 10 Cush. 288, 57 Am. Dec. 105; *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Forniquet v. Tegarden*, 24 Miss. 96; *Stone v. Hooker*, 9 Cow. 154; *Pierson v. Thompson*, 1 Edw. Ch. 212; *Jamieson v. Calhoun*, 2 Spear, 19; *Kemper v. Kemper*, 3 Rand. 8.

An indemnifying bond taken by an officer before a levy where there are doubts whether the property is or is not subject to the execution is valid and may be enforced: *Wolfe v. McClure*, 79 Ill. 565; *Train v. Gold*, 5 Pick. 380; *Forniquet v. Tegarden*, 24 Miss. 96; *Waterman v. Frank*, 21 Mo. 108; *Van Cleef v. Fleet*, 15 Johns. 147; *Preston v. Yates*, 24 Hun, 534; *Stevens v. Bransford*, 6 Leigh, 246. As an engagement to indemnify a sheriff in the execution of a law-

ful or apparently legal act is valid, an indemnity bond given to him in cases of disputed property in goods to induce him to execute or not to execute a fieri facias against such goods is also valid: *Forniquet v. Tegarden*, 24 Miss. 96. So a bond of indemnity is valid if there is a dispute about the appropriation of assets received on sales under various executions, and such bond is given by one of the contestants to induce the sheriff to pay the proceeds over to him: *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83.

The bond of a judgment creditor conditioned that he will indemnify an officer, if the latter will sell property held by him under execution at the suit of the creditor, but which is claimed by the debtor as exempt, is valid and not void as being against public policy: *Miller v. Rhoades*, 20 Ohio St. 494; *Mays v. Joseph*, 34 Ohio St. 22. This rule was reaffirmed in the late case of *Whitney v. Gammon*, 103 Iowa, 363, 72 N. W. 551; *Whitney v. Gammon* (Iowa, Oct. 6, 1900), 83 N. W. 807, wherein it is maintained that if there is a dispute between the owner of property taken under execution and the judgment creditor as to whether such property is exempt at the time of giving the bond to the sheriff to induce the sale of the property, such indemnity is valid, regardless of the knowledge of the judgment creditor as to whether the property was exempt at the time of the levy, or whatever his secret purpose may be in giving such bond.

A promise to indemnify for the performance of an act not known at the time to be unlawful is valid: *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376. A bond to indemnify against a return "ready to satisfy," when in fact the execution has not been levied, has been deemed valid: *Kemper v. Kemper*, 3 Rand. 8; and so has a note given to induce a sheriff to relinquish an attachment: *Foster v. Clark*, 19 Pick. 329.

b. **Bonds Defectively Executed.**—A bond given to the sheriff by a plaintiff in execution conditioned to indemnify a claimant of property taken under the execution against damages by reason of the seizure is a valid bond, though it lacks the condition for the indemnification of the sheriff provided by the statute: *Flint v. Young*, 70 Mo. 221; *Falghum v. Connor*, 99 Ga. 237, 25 S. E. 406. Or if the bond is so drawn as to be defective and not good as a statutory bond, yet it may be valid as a common-law bond and enforced by the sheriff: *Dabney v. Catlett*, 12 Leigh, 383. Or if the statute under which the bond is drawn is void or afterward declared invalid, yet the bond may be valid as a common-law bond and enforced as such: *Porter v. Daniels*, 11 W. Va. 250.

c. **Indemnity Against Act Already Committed** is valid although the act was unlawful. Thus a contract entered into to indemnify a sheriff for a past neglect of duty is not void for illegality: *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332. Or a bond given to

an officer to indemnify him against all suits, damages, and costs by "reason of said attachment," if the obligor knows that such attachment was unlawful, makes him liable therefor and for a subsequent conversion of the goods by a sale thereof by such officer: *Knight v. Nelson*, 117 Mass. 458. Indemnity against an illegal levy already made is valid, especially if not known to be illegal at the time: *Griffith v. Hardenbergh*, 41 N. Y. 464. So a bond to indemnify against an escape, after the escape is suffered, is valid: *Given v. Driggs*, 1 Caines, 450; *Doty v. Wilson*, 14 Johns. 378.

d. **Bond not Signed by Principal.**—A bond of indemnity purporting to be the bond of the plaintiff in the action, as principal, and two others as sureties to insure an officer from a claim to property levied upon by him, though not signed by the principal, is binding upon the sureties, although it was understood and agreed that the bond should be signed by the principal before delivery, if this was not known to the officer accepting the bond: *Woodman v. Calkins*, 13 Mont. 363, 40 Am. St. Rep. 449, 34 Pac. 187; *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027.

II. When Void.

A bond given to indemnify an officer for a known violation of duty, or against the intentional and known commission of a trespass, crime, or wrong, is void as being opposed to public policy, and cannot be enforced: *Stark v. Raney*, 18 Cal. 622; *Buffendeau v. Brooks*, 28 Cal. 641; *Nelson v. Cook*, 17 Ill. 443; *Cole v. Parker*, 7 Iowa, 167, 71 Am. Dec. 439; *Harrington v. Crawford*, 136 Mo. 467, 58 Am. St. Rep. 653, 38 S. W. 80; *Griffith v. Hardenbergh*, 41 N. Y. 464; *Cumpston v. Lambert*, 18 Ohio, 81. Thus a bond given to a sheriff to indemnify him for neglecting his duty in the service of a precept is void: *Hodson v. Wilkins*, 7 Greenl. 113, 20 Am. Dec. 347; or for omitting to do that which it is his plain duty to do, as to execute final process: *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Harrington v. Crawford*, 136 Mo. 467, 58 Am. St. Rep. 653, 38 S. W. 80; *Denson v. Sledge*, 2 Dev. 136; indemnity executed to a sheriff or other officer to induce him to omit the levy of a writ or performance of other duty does not protect him against the party at whose suit the writ is issued, and the agreement being without consideration so far as concerns the officer, cannot be enforced by him or for his benefit, and is also void from considerations of public policy: *Cole v. Parker*, 7 Iowa, 167, 71 Am. Dec. 439. Thus indemnity to "hold up" an execution beyond the return day thereof is void: *Barnes v. Jackson*, 2 Sneed, 416. And if an officer charged with the execution of final legal process takes from the party against whom it is directed a bond to indemnify him for noncompliance with the writ, such bond is opposed to public policy and invalid, though the officer acts in good faith and out of doubt, after diligent inquiry as to his duty in the premises. This, under the uniform rule that a contract to in-

demnify an officer for omitting to do that which it is his duty to do, and which he ought to do, is void as against public policy: *Harrington v. Crawford*, 61 Mo. App. 221. Indemnity given to a sheriff to induce him to levy a void execution is itself void, and cannot be enforced: *Collier v. Windham*, 27 Ala. 291, 62 Am. Dec. 767. So indemnity against an act of disobedience in refusing to permit the execution debtor to exercise his right of selection of property exempt under the statute is founded upon an illegal consideration, and void as against public policy; *Renfro v. Heard*, 14 Ala. 23, 48 Am. Dec. 82; *Johnson v. Ragsdale*, 73 Mo. App. 594. Indemnity to an officer for any loss or damage sustained by him in selling property levied on by him by virtue of an execution in violation of an order enjoining its sale, is an unlawful contract, and void: *Buffendeau v. Brooks*, 28 Cal. 641.

An agreement to indemnify an officer for a willful trespass about to be committed by him is against public policy, and void: *Stark v. Raney*, 18 Cal. 622; *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376; *Griffith v. Hardenbergh*, 41 N. Y. 464. Thus a contract for indemnity to a sheriff for levying upon and selling the property of a third person or stranger to the judgment and known not to belong to the defendant in execution is void: *Prewitt v. Garrett*, 6 Ala. 128, 41 Am. Dec. 40; *Chapman v. Douglas*, 5 Daly, 244. Or for the performance of an unlawful act, such as a trespass in making an illegal arrest: *Cumpston v. Lambert*, 18 Ohio, 81, 51 Am. Dec. 442.

Indemnity given to an officer against the voluntary escape of a prisoner is void as against the policy of the law: *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 232; *Lowrey v. Barney*, 2 D. Chip. 11; or for his appearance at a certain time: *Millard v. Canfield*, 5 Wend. 62. And a promise to indemnify a sheriff for releasing a defendant from arrest is void as against public policy. The sheriff must obey his writ and cannot take indemnity for refusing to obey it, although the person making the promise falsely informs him that the process has been satisfied: *Webber v. Blunt*, 19 Wend. 188, 32 Am. Dec. 445. Or, if an officer releases a prisoner who has been committed to his custody until a fine should be paid, upon the promise of a third person to pay such fine, he cannot maintain an action on such promise: *Kenworthy v. Stringer*, 27 Ind. 498.

DOW LAW BANK v. GODFREY.

[126 Mich. 521, 85 N. W. 1075.]

PROMISSORY NOTE, WHO DEEMED TO BE MAKERS.—
'ALL WHO SIGN THEIR NAMES ON THE BACK OF A PROM-
ISSORY NOTE BEFORE DELIVERY are makers, whether it is
negotiable or not. (p. 560.)

NEGOTIABLE INSTRUMENTS, WHEN SEVERAL AS
WELL AS JOINT.—If an instrument worded in the singular is executed by several, the obligation is joint and several. (p. 561.)

George W. Bridgman, for the appellant.

Gore & Harvey, for the appellee.

523 MONTGOMERY, C. J. This action is based upon two promissory notes—one for two thousand dollars and one for one thousand dollars—given in July, 1895. The notes are in the same form, the first one being as follows:

"\$2,000.00 Fort Valley, Ga., July 18, 1895.

"Thirty days after date, I promise to pay to the Dow Law Bank, or order, two thousand and no one-hundredths dollars, for value received, payable at said bank, with interest from maturity at the rate of eight per cent per annum, with all costs of collection, including ten per cent attorney's fees.

"And each of us, whether maker, security, or indorser on this note, hereby waives and renounces, for himself and family, any and all homestead and exemption rights to which he or they may in any event be entitled under any provision of the constitution or laws, state or federal, as against this note, or any renewal thereof.

"Witness my hand and seal.

"W. H. HARRIS. [L. S.]"

Note indorsed: "GODFREY & HARRIS.

"C. H. GODFREY."

The second note is in the same form, except defendant's name appears on the face of the note, and those of the other parties on the back. The declaration contained special counts, and also the common counts, with a copy of these notes appended.

The testimony on the trial disclosed that one W. H. Harris and defendant entered into a partnership agreement in the summer of 1895 to engage in the business of canning fruit at

Fort Valley, Georgia, the home of the plaintiff bank. Harris agreed to furnish on the firm's notes as much as five thousand dollars, the firm paying interest and discounts. They entered upon the business. About four thousand dollars was furnished on paper payable to the order of Harris, signed by the firm and by the defendant individually. Later on, the two notes in question were given to the Dow Law Bank. The canning season closed about the 5th of August, 1895, and defendant left for his home in the north. He asserted in his defense that Harris, his copartner, was president of the bank, and that the defendant ⁵²³ agreed with Harris, as president of the bank, that the bank should pay, with the first money received from the firm of Godfrey & Harris, for canned goods or otherwise, any money, or notes or obligations for money, borrowed from the bank, in regular order, and that the first money realized should be applied upon the notes in question. The defendant testified to this arrangement. Harris disputes it in his testimony, and states that there was no agreement as to what notes should be first paid.

It appears from the testimony that the obligations given by the firm to Harris for the purpose of raising the four thousand dollars or thereabouts found their way into the hands of the bank, and were paid from proceeds of shipments made by Harris, and turned in to the bank. Among the claims made by defendant is the one above stated that this was a misapplication of the money which came into the hands of the bank, and that the money should have been applied to retire the paper in suit. Defendant also contends that this paper was joint paper, that it did not amount to promissory notes, and that no recovery can be had upon them. It is also claimed that the suit should have failed because of the non-joinder of Harris. And it is also claimed that the record conclusively shows that the bank had received sufficient funds with which to pay these notes. These are the principal questions presented in the case.

We think it is immaterial that the notes in question are not negotiable notes. They were payable in the first instance to the plaintiff, signed by Harris, also by the firm of Godfrey & Harris, and by C. H. Godfrey, the defendant. It is true that the names of some of the signers were on the back of the note, but, under repeated rulings of this court, the undertaking of all the parties was that of makers: *Wetherwax v.*

Paine, 2 Mich. 555; Rothschild v. Grix, 31 Mich. 150, 18 Am. Rep. 171.

But it is said that these obligations were joint, and that there was a nonjoinder of defendants, which could be ⁵²⁴ taken advantage of under the general issue. It is conceded that the general rule is that nonjoinder of defendants must be pleaded in abatement, but it is said that in this case the nonjoinder appears from the declaration, and that the question may be raised under the general issue. The question of whether a nonjoinder should be pleaded in abatement becomes immaterial, as under the authorities this undertaking was a joint and several obligation. See 1 Parsons on Contracts, 11, note, where the rule is stated that: "If an instrument worded in the singular is executed by several, the obligation is a joint and several one," and cases there cited. See, also, Van Alstyne v. Van Slyck, 10 Barb. 387; Carter v. Carter, 2 Day, 442, 2 Am. Dec. 113; Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716; Maiden v. Webster, 30 Ind. 317; Hemmenway v. Stone, 7 Mass. 58, 5 Am. Dec. 27; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48.

It will be seen, therefore, that the case narrows itself down to two propositions: 1. Are we able to say from this record that it conclusively appears that these notes were paid? The counsel for defendant has attempted to state the account between the plaintiff and the firm of Godfrey & Harris, and to deduce therefrom that sufficient funds came into the hands of the bank to pay all the obligations. We have given a careful examination of the record, and are convinced that the question of whether these notes were paid was a question for the jury.

The circuit judge, in charging the jury, stated that the main question was whether the arrangement claimed by Mr. Godfrey to have been made with Harris, as president of the bank, to apply on the paper in suit the first moneys of Godfrey & Harris that came into the hands of the bank, was made. The court charged the jury that Mr. Harris, as president of the bank, had the right to make that agreement, and that the real question for the jury was whether the notes had been paid in some way, or whether the parties had placed themselves in such a ⁵²⁵ condition that the law would treat them as having been paid. We think the jury could not have failed to understand that, if the arrangement in question was made, the first moneys that came into the bank

should be treated as payment. The plaintiff, having waived the right to recover anything in excess of one-half of the notes, recovered a judgment for sixteen hundred and eighty-two dollars and sixty-three cents, which is one-half the amount of these notes less an admitted payment of five hundred and twenty-seven dollars and twenty-one cents. We think the case was fairly submitted to the jury by the trial judge, and we are not able to see that the evidence conclusively sustains the theory of defendant.

The judgment will be affirmed.

The other justices concurred.

One Who Indorses a Note before its delivery is generally held to be a joint maker or surety: See the monographic note to *Cadwallader v. Hirshfeld*, 72 Am. St. Rep. 676; *Merchants' Trust etc. Co. v. Jones*, 95 Me. 335, 85 Am. St. Rep. 412, 50 Atl. 48. But see *Davis v. Bly*, 164 N. Y. 527, 79 Am. St. Rep. 670, 58 N. E. 648.

A Note Written in the Singular and signed by several persons is joint and several: *Dart v. Sherwood*, 7 Wis. 523, 76 Am. Dec. 228; *Hemmenway v. Stone*, 7 Mass. 58, 5 Am. Dec. 27; *Ladd v. Baker*, 26 N. H. 76, 57 Am. Dec. 355; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74.

EAGLE v. SMYLLIE.

[128 Mich. 612, 85 N. W. 111.]

HOMESTEAD — FRAUDULENT TRANSFERS. — Creditors have no right to complain of dealings with property which the law does not allow them to apply to their claims. Hence a gift of a homestead cannot be assailed by them as a fraud on their rights, though the donor soon afterward dies, leaving no wife or children surviving him. (p. 566.)

Bill by Eagle against the administrator of James R. Elliott, deceased, and others for the partition of real property. The court directed the payment of the proceeds of the decedent's interest to his grantee, George M. Savage, and the administrator appealed.

M. Hubert O'Brien and Keena & Lightner, for the appellant.

Edward W. Pendleton, for the defendant George M. Savage.

⁶¹² MOORE, J. By this appeal the court is asked to decide the question whether the sum of eleven hundred and

twenty-eight dollars and seventy-two cents, being a part of the proceeds of the sale of certain premises, should be paid to defendant George M. Savage or to the defendant Robert W. Smylie, administrator of the estate of James R. Elliott, deceased.

The proceeding in the court below was a bill of partition filed in March, A. D. 1899, wherein the complainant, Mrs. Elizabeth E. Eagle, sought to have partition of certain premises on Congress street east, in Detroit, which prior to 1841 belonged to her father, Robert Thomas Elliott, of Detroit. The bill of complaint sets up the many transfers in the title after that date, and shows that prior to August 3, A. D. 1898, James R. Elliott, an unmarried man and brother of complainant, acquired substantially a six-sevenths interest in the property; that complainant had the largest remaining interest, and the other Elliott defendants held the small remaining undivided interests. In 1893 James R. Elliott, who alone of the owners in common of the premises had been in possession of the same for some years previous thereto, and who alone of said owners continued to occupy the same until his death, executed a mortgage upon his interest in the premises for the sum of eighteen hundred dollars, which mortgage defendant George M. Savage duly acquired after the death of said James R. Elliott, and shortly prior to the filing of the bill of partition. James R. Elliott died on August 31, A. D. 1898. During his last illness, and on or about August 3, A. D. 1898, Mr. Elliott, by quitclaim deed, conveyed an undivided one-half of his interest in the premises to Adelia M. Carey and to John C. Elliott, each. Miss Carey, shortly after the death of Mr. Elliott, married defendant George M. Savage, and she is a defendant in this proceeding as Adelia M. Savage. Defendant George M. Savage acquired by quitclaim deed the interest of his wife in said premises, and, subsequent to the filing of the bill of partition, also by quitclaim deeds, he acquired any interest that John C. Elliott had in the property.

The bill of complaint further sets forth the appointment of defendant Robert W. Smylie as administrator of the estate of James R. Elliott, deceased; the appointment of commissioners on claims in due course of administration in the probate court for the county of Wayne; the insolvency of the estate; and the claim asserted by defendant Smylie, as administrator, that, upon any sale of the premises under the partition proceedings, he was entitled to the interest therein, over and above

the mortgage above ⁶¹⁴ referred to, which James R. Elliott had prior to the third day of August, A. D. 1898, being the date of the quitclaim deeds to Miss Carey and to John C. Elliott, on the ground that the said conveyances were voluntary, and without consideration, as against claims of the creditors of deceased.

The answer of defendant Smylie, as administrator aforesaid, states the claims allowed against the estate of James R. Elliott, deceased, as being four thousand seven hundred and four dollars and thirty-nine cents, and that the assets of the estate amounted to six hundred and forty dollars; and he asserts his right, as administrator, to the surplus, over the mortgage, which belonged to James R. Elliott before he gave the quitclaim deeds above referred to.

The answer of defendant George M. Savage and his wife denies the claim of defendant Smylie to the fund in question, and asserts that the quitclaim deeds were given upon sufficient consideration. This answer was afterward amended, setting up that the land conveyed was a homestead when the quitclaim deeds were made, in which the creditors had no interest.

§ On February 26, A. D. 1900, a decree was entered in the circuit court, establishing the interests of the several owners in common to the premises, ordering a sale of the property, and reserving for the further order of the court the determination of several questions, among which was the controversy between defendant Savage and defendant Smylie, as administrator, as to their right to any amount arising from the sale which would represent the interest, over and above the mortgage, which James R. Elliott had in the premises on August 3, A. D. 1898. This amount was determined to be eleven hundred and twenty-eight dollars and seventy-two cents.

It is not claimed there was any intent on the part of Mr. Elliott to defraud his creditors in making this deed. The grantees in the deed were adopted children, who had lived with him a long time, and rendered him valuable service, and he without doubt thought he was leaving enough estate to pay his debts; but it is insisted that, as he was in fact insolvent, the conveyance was, in law, a fraud upon his creditors.

⁶¹⁵ In our view of the case we need consider but one question, and that is whether the creditors can complain of the conveyance by Mr. Elliott of his homestead. The position of counsel for the administrator is that the homestead is not an absolute estate, but at most is an artificial estate, which may

be waived by the person to whose benefit it inures: Citing *Riggs v. Sterling*, 60 Mich. 652, 1 Am. St. Rep. 554, 27 N. W. 705; 15 Am. & Eng. Ency. of Law, 2d ed., 638, 639. Counsel say: "We admit that James R. Elliott had a homestead interest in the premises at the time he executed the quitclaim deeds in question, while calling attention to the fact that he alone had any such interest in the property, and while emphasizing the fact that any homestead interest in the premises lapsed with his death. There being no widow or children surviving him, the provisions of sections 3 and 4 of article 16 of the constitution have no application to this case. We admit that the homestead law (3 Comp. Laws 1897, sec. 10,362), which is founded upon the constitutional provisions, has been and should be liberally construed, and that the real estate, while occupied as a homestead—that is, in this case, during the life of James R. Elliott—could not be levied upon or in any other way subjected to the claims of his creditors. Furthermore, we admit that James R. Elliott might have sold his property, and during his lifetime his creditors could not complain of the sale, even if it was voluntary. And, further, if Mr. Elliott had sold his interest in the property for, say, fifteen hundred dollars, this fund would likewise have been exempt from process during a reasonable time within which to invest the same in another homestead: *Cullen v. Harris*, 111 Mich. 20, 66 Am. St. Rep. 380, 69 N. W. 78. But our contention is that appellant, as administrator, may, in behalf of such creditors, attack such voluntary conveyance after the death of James R. Elliott."

They argue that the homestead is a privilege personal to the owner, and may be waived by him, and that a gift of the homestead is fraudulent as to the creditors: Citing *Fellows v. Lewis*, 65 Ala. 343, 39 Am. Rep. 1; *Kingsbury v. Wild*, 3 N. H. 30; *Currier v. Sutherland*, 54 N. H. 486, 20 Am. Rep. 143; *Ruohs v. Hooke*, 3 Lea, 306, 31 Am. Rep. 642; *Schaffer v. Beldsmeier*, 107 Mo. 314, ⁶¹⁶ 17 S. W. 797; *Miller v. Leeper*, 120 Mo. 466, 25 S. W. 378.

An examination of the authorities will show a want of harmony in them. The following authorities are to the effect that a creditor has no interest in a homestead, and cannot complain of its conveyance by the debtor: *Crummen v. Bennet*, 68 N. C. 494; *Sears v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378; *Wood v. Chambers*, 20 Tex. 247, 70 Am. Dec. 382; *Hibben v. Soyer*, 33 Wis. 319; *Dreutzer v. Bell*, 11 Wis. 114; *Conklin v. Foster*, 57 Ill. 104; *Hartwell v. McDonald*, 69 Ill. 293; *Smyth*

on Homesteads, sec. 234; *Legro v. Lord*, 10 Me. 165; *Baker v. Kinnaird*, 94 Ky. 5, 21 S. W. 237. In *Marshall v. Strange* (Ky.), 9 S. W. 250, it was held that, where a debtor conveys a portion of his homestead, the whole of which is worth less than the statutory limit, his creditors cannot, after his death, charge the land so conveyed with his debts. In *Grimes v. Portman*, 99 Mo. 229, 12 S. W. 792, it was held one may sell, mortgage, or give away his homestead, and his creditors cannot complain.

The question in this state is not a new one. The constitutional provision is as follows: "Every homestead . . . shall be exempt from forced sale on execution, or any other final process from a court, for any debt contracted after the adoption of this constitution": Const., art. 16, sec. 2.

The statutory provision reads: "A homestead . . . owned and occupied by any resident of this state shall not be subject to forced sale on execution or any other final process from a court, for any debt or debts growing out of or founded upon contract, either express or implied, made after the third day of July, A. D. 1848": 3 Comp. Laws 1897, sec. 10,362.

In *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705, it was argued, as it is argued here, that the homestead is a privilege personal to the owner, and not an absolute right. The court said: "The homestead exemption, as it now exists, is not ⁶¹⁷ only a privilege conferred (*Chamberlain v. Lyell*, 3 Mich. 458), but, under the constitution, it is an absolute right. 'It was intended to secure against creditors a home, and, to a certain extent, the means of support, to every family in the state': *Dye v. Mann*, 10 Mich. 297; *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743."

In *Farrand v. Caton*, 69 Mich. 242, 37 N. W. 203, it is said one may do what he pleases with his exempt property.

In *Anderson v. Odell*, 51 Mich. 492, 16 N. W. 870, it is said creditors have no right to complain of dealings with property which the law does not allow them to apply on their claims.

In *Rhead v. Hounson*, 46 Mich. 243, 9 N. W. 267, in speaking of a voluntary conveyance of real estate from a father to a son, the court said: "It appears conclusively from the bill and evidence that, when the execution debtor gave the deed in question, he held and occupied a homestead on the premises. That part of the farm was therefore exempt. The holder was as free to dispose of it without interference as though he had not been indebted at all": Citing *Smith v. Rumsey*, 33 Mich. 183.

See, also, *Pulte v. Geller*, 47 Mich. 560, 11 N. W. 385; *Vermont Sav. Bank v. Elliott*, 53 Mich. 256, 18 N. W. 805; *Armitage v. Toll*, 64 Mich. 412, 31 N. W. 408; *Toll v. Davenport*, 74 Mich. 386, 42 N. W. 63; *Cullen v. Harris*, 111 Mich. 20, 66 Am. St. Rep. 380, 69 N. W. 78.

We think the circuit judge made a decree in harmony with the uniform decisions of this court. The decree is affirmed.

Montgomery, C. J., and Hooker and Long, JJ., concurred.

Grant, J., did not sit.

A Transfer of a Homestead cannot be fraudulent as to creditors of the grantor: *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595, 84 N. W. 359; *Cox v. Birmingham Drygoods Co.*, 125 Ala. 320, 82 Am. St. Rep. 233, 28 South. 456; *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433; *Gray v. Patterson*, 65 Ark. 373, 67 Am. St. Rep. 937, 46 S. W. 730, 1119.

LANSING v. MICHIGAN CENTRAL RAILROAD CO.

[126 Mich. 663, 86 N. W. 147.]

AN INFANT CANNOT, DURING THE CONTINUANCE OF HIS INFANCY, DISAFFIRM or avoid his contract or compromise on the ground that he made it while an infant. (p. 569.)

Action by Edith Lansing, by next friend, against the defendant railroad company to recover for personal injuries. The court directed a verdict for the defendant, and the plaintiff brought error.

Ira G. Humphrey and Willis Baldwin, for the appellant.

C. A. Golden and Henry Russel, for the appellee.

663 MOORE, J. In November, 1899, plaintiff was injured in a railroad accident upon defendant's railroad. To recover damages for said injury, she sued defendant in the Monroe circuit court. No next friend was appointed. Her attorneys were Look & Humphrey. Negotiations were had between Mr. Pond, acting for the defendant, and Mr. Look, acting for plaintiff, looking to a settlement of the controversy. Mr. Look telegraphed plaintiff to come to Detroit, and she did so. A settlement was agreed upon. The plaintiff signed and caused to be delivered to defendant the following paper:

“May 25, 1900.

“The Michigan Central Railroad Co., to Edith Lansing, Dr.,
Toledo, Ohio.

“For amount agreed to be paid by said company and received by Edith Lansing in compromise of a claim presented to this company by said Edith Lansing for damages ^{““} on account of injury to her person and property alleged to have been suffered by her by wreck of a train of said company on November 9th near Vienna station, between Detroit and Toledo, and in settlement and compromise of the suit now pending in the circuit court for the county of Monroe, Michigan, in which said Edith Lansing is plaintiff and the Michigan Central Railroad Company is defendant (said suit to be discontinued), \$750.

“Said company claims that said train was wrecked without fault on its part, but maliciously, by persons having no connection with it, and that it is neither morally nor legally liable in the premises; and it has consented to make this payment solely in compromise of the claim so presented.

“Received, May 25, 1900, seven hundred and fifty dollars (\$750), in full of above.

“EDITH LANSING. [L. S.]

“In presence of:

“JOSEPH F. VIESON.

“ALFRED LEVY.

“WILLIAM LOOK.

“To John E. Griffiths, Local Treasurer M. C. R. R. Co., Detroit, Mich.:

“You are hereby authorized and requested to pay the above amount of seven hundred and fifty dollars by check to the order of William Look, my attorney.

“EDITH LANSING. [L. S.]

“In presence of:

“JOSEPH F. VIESON.

“ALFRED LEVY.

“WILLIAM LOOK.

[Revenue Stamp.]

“Received check of Michigan Central R. R. Co. for \$750 in payment of within voucher.

“May 26, 1900.

WILLIAM LOOK.

“For LOOK & HUMPHREY.

“Witness: GEORGE E. TEGART.”

Upon the payment of the money the suit in the circuit court was discontinued. Some time after this the present suit was brought, Mr. Humphrey acting as the attorney for the plaintiff. It is her claim that she was induced by the false statements of Mr. Look to agree to the settlement; that she was under age when she signed the papers, ⁶⁶⁵ and is not bound by the settlement, because she was a minor when she entered into it. She claimed on the trial that but three hundred dollars was paid to her, and offered to show that she had spent the money for necessities, and for that reason could not return it to the defendant.

Upon the trial plaintiff gave testimony tending to show the accident, and the fact that she was injured, and claimed that, when the settlement was entered into, she was under the age of twenty-one years, and was still under twenty-one years of age at the time of the trial. Defendant offered in evidence the settlement, and also the testimony of the father of the plaintiff, and admissions made by the plaintiff, tending to show she had attained her majority when the settlement was made. The circuit judge was of the opinion that, upon any theory of the case, plaintiff was not entitled to recover; that if she was of age when the settlement was made, as it is not claimed that defendant was party to any fraud, the plaintiff would be bound by it; that, if she was not twenty-one years of age when the case was tried, then she was too young to disaffirm the settlement, and for that reason could not recover.

It is claimed by counsel for plaintiff that the settlement was not a contract, and could be avoided at any time. It is also contended that, even if it is deemed a contract, it could be disaffirmed at any time, counsel citing a number of authorities. An examination of these authorities shows a good deal of confusion in the various decisions, but the questions involved are not new in this state. If the plaintiff had attained her majority at the time when she agreed upon a settlement with the attorney for defendant, and signed the papers which she did sign, she would have been bound by the settlement, in the absence of fraud: *Lewless v. Detroit etc. Ry. Co.*, 65 Mich. 292, 32 N. W. 790. Conceding that the plaintiff at this time was under age, what was done was not void, but voidable only. The railroad company was bound by it. It could be avoided only by the infant. In *Dunton v. Brown*, 31 Mich. 182, it is said: ⁶⁶⁶ "An infant's partnership agreement is not void. It is, at best, only voidable; and we have found no authority which enables the

infant or his guardian to determine whether a voidable contract shall be affirmed or annulled while the infancy continues. It appears to be a matter for his own decision when he arrives at mature age. It is only such agreements as are not possibly to be regarded as beneficial to him which are null from the beginning."

In *Armitage v. Widoe*, 36 Mich. 124, it is said: "In what has thus far been said, we have not touched upon the authority of the infant to disaffirm a contract of purchase before coming of age. If the contract had become his in any way, it would be, we take it, only a voidable contract; and in *Dunton v. Brown*, 31 Mich. 182, the right to disaffirm a voidable contract during infancy was denied": See, also, *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299.

The direction of the circuit judge is justified by the Michigan cases.

Judgment is affirmed.

Hooker, Long, and Grant, JJ., concurred.

Montgomery, C. J., did not sit.

An Infant's Personal Contracts and his contracts relating to personal property may be disaffirmed by him during his minority. His conveyances, ordinarily, cannot be: See the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 668-671.

WESTINGHOUSE COMPANY v. BOYLE.

[128 Mich. 677, 86 N. W. 136.]

STATUTE OF LIMITATIONS.—INDORSEMENT OF PAYMENT ON A PROMISSORY NOTE IS NOT EVIDENCE OF A NEW PROMISE, nor does it interrupt the running of the statute of limitations if the payment resulted merely from crediting on the note a sum realized from the sale of property under a chattel mortgage. Though the mortgagee, in making the sale, acted under a power contained in the mortgage and was under a duty to credit the amount realized, yet, in so doing, he cannot be regarded as acting as agent of the mortgagor to the extent of making a new promise for him. (p. 572.)

Assumpsit on certain promissory notes. The court directed judgment for the defendant, and the plaintiff brought error.

Black & Dolan, for the appellant.

L. B. McArthur and Thomas, Cummins & Nichols, for the appellee.

¶ LONG, J. These two cases were tried as one before a jury, and verdict directed by the court in favor of defendant. It appears that in 1891 defendant bought a bean thresher of plaintiff for four hundred and thirty dollars, giving a chattel mortgage thereon for the full amount, together with his three promissory notes for one hundred and forty-three dollars and thirty-three cents each, due, respectively, as follows: December 28, 1891, September 28, 1892, and September 28, 1893—with interest from maturity. These notes were secured by the chattel mortgage. Defendant paid the first note at the time it became due. In September, 1893, plaintiff called on defendant for payment of the other notes, and he refused to pay on the ground that the plaintiff should repair the machine. On December 16, 1893, defendant wrote the plaintiff as follows:

“Leslie, Mich., Dec. 16, 1893.

“Westinghouse Co., Schenectady, N. Y.

“Gentlemen: Your Mr. Bates was at my place yesterday; notified me that he was going to sell the bean huller, by chattel mortgage sale, bought of you in '91, for which you hold two of my notes to the amount of two hundred and eighty dollars, or thereabouts. ¶ As you are aware, I heretofore notified you that I could not do satisfactory work with the machine, and have asked you and your agents repeatedly to repair it up, and I would then willingly pay for it. As you paid no attention to these requests, I delivered the machine to your Mr. Bates at the transfer house at Jackson this fall. I wish to notify you now, before making yourselves any expense, that I am ready and willing to satisfy my notes when you make the machine satisfactory to me or my customers. Unless you do this, I wish to give you notice that I shall pay nothing further on the notes, nor pay any attention to any chattel mortgage sale you may have. As the notes are both past due, I am entitled to an offset against them, and shall defend myself to the end, in case you should try to collect them by force. If your intentions are strictly honorable, and your state agent would call on me with that intention, before any sale, and arrange to repair this machine up in satisfactory shape, all could be made satisfactory; but, until the machine has first been put in A1 shape, I shall do nothing, so you can act your own pleasure, but please

answer this letter. I send this by registered letter, that there may be no mistake about your getting it. Yours truly,

"JAMES BOYLE."

Thereafter the plaintiff found the machine at the transfer house at Jackson, took it under its chattel mortgage, and proceeded, under the power of sale contained in the mortgage, to sell it. It sold for twenty-five dollars, from which the costs of sale were deducted, leaving a balance of nine dollars and forty cents. The sale was made on December 22, 1893, and reported to the home office in New York, where the plaintiff indorsed on each note four dollars and seventy cents. These suits were commenced on these notes December 7, 1899. It is conceded that the notes were barred by the statute of limitations at the time suit was commenced, unless taken out of the bar by the indorsement on December 22, 1893, of the four dollars and seventy cents on each.

The contention of counsel for plaintiff is that the notes and mortgage must be taken together, and construed as one transaction; that, under the power of sale contained in the mortgage, it was the right of the plaintiff to sell the security upon default of payment, and, when the sale was made, it was plaintiff's duty to indorse the proceeds ⁶⁸⁰ upon the notes; that in making the sale plaintiff was acting as the agent of defendant under the power contained in the mortgage, and that therefore in making the indorsements it was acting for defendant and in his interest; that the indorsements were as much the act of the defendant as though he had made them himself; and that the application of the proceeds of the sale was a good part payment, within the terms of section 9744 of 3 Compiled Laws of 1897, which provides: "Nothing contained in the four preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person; but no indorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange, or other writing by or on behalf of the party to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the provisions of this chapter."

Counsel cite *Blair v. Carpenter*, 75 Mich. 167, 42 N. W. 790, as sustaining this claim. We think not. In that case it was conclusively shown that the agent of Myron Harris turned over the new mortgage, the amount of which was indorsed upon

the old mortgage, and that payment operated to take the first mortgage out of the bar of the statute. In the present case, while it may be said that, on the sale of the machine, the plaintiff was bound to indorse the net amount of moneys received upon the notes, it does not follow that in making such indorsement the notes were taken out of the bar. In order that indorsements may have such effect, there must be something in the case to show, or tending to show, a new promise, either express or implied. It cannot be said that by the giving of the chattel mortgage in 1891, containing a power of sale upon default of payment, though the plaintiff, in acting under such power as the agent of defendant, would be bound to apply the proceeds upon the notes, it follows that it was the intention of the defendant to have such payments operate as a renewal of the notes. In other words, there is nothing in these facts ⁶⁸¹ that shows a new promise, either express or implied. In *Jewett v. Petit*, 4 Mich. 508, this question was discussed, and the rule stated that unless the debtor renounces the benefit and protection of the statute, and voluntarily makes a new promise to pay the old debt, the bar is not removed. In *Lester v. Thompson*, 91 Mich. 254, 51 N. W. 893, it was said: "The rule is well settled that part payment is but evidence of an admission of an indebtedness; but an admission of an indebtedness, to take the case out of the statute, must be such as reasonably leads to the inference that the debtor intended to renew his promise to pay": See, also, *Parsons v. Clark*, 59 Mich. 417, 26 N. W. 656; *Home Life Ins. Co. v. Ellwell*, 111 Mich. 689, 70 N. W. 334. We think these cases are conclusive of the present.

The judgment must be affirmed.

The other justices concurred.

Limitations.—A creditor cannot be made the agent of his debtor to such an extent as to make an act done by him operate as a new promise to himself. And where collateral security is given, its sale and the application of the proceeds on the debt will not operate as a part payment so as to interrupt the running of the statute of limitations: *Wolford v. Cook*, 71 Minn. 77, 70 Am. St. Rep. 315, 73 N. W. 706; *Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568. If a debtor delivers to his creditor, in part payment, the note of a third person which is paid at maturity, the statute begins to run from the time of the delivery of the note and not from the time of its payment: *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60. A grantee who assumes the mortgage on the property does not, by a subsequent part payment thereof, toll the statute as against his grantor: *Cottrell v. Shepherd*, 86 Wis. 649, 39 Am. St. Rep. 919, 57 N. W. 983.

ATTORNEY GENERAL v. OAKMAN.

[126 Mich. 717, 86 N. W. 151.]

PUBLIC OFFICERS.—THE HOLDING OF ONE OFFICE DOES NOT RENDER THE INCUMBENT INELIGIBLE TO ANOTHER AND INCOMPATIBLE OFFICE, for his acceptance of a second office must result in his vacating the first. (p. 574.)

PUBLIC OFFICERS, TERM OF.—THE LEGISLATURE MAY FIX the term of officers other than those provided for in the state constitution. (p. 575.)

PUBLIC OFFICERS.—AN APPOINTMENT TO OFFICE CANNOT BE RECALLED after the appointing power has once exercised its functions. (p. 576.)

PUBLIC OFFICERS—RECONSIDERATION OF SENATE'S CONSENT TO APPOINTMENT OF.—The vote of the Senate that it advise and consent to an appointment to office made by the governor is subject to reconsideration at the same session. (p. 577.)

Quo warranto by the attorney general on relation of William T. Dust against Robert Oakman to determine the title to office of member of the board of state tax commissioners.

Horace M. Oren, attorney general, and H. M. & D. B. Duffield, for the relator.

Jerome W. Robbins, Fred A. Baker, T. E. Tarsney, C. D. Joslyn, Allen B. Morse, and Benton Hanchett, for the respondent.

718 MONTGOMERY, O. J. This controversy involves the title to the office of member of the board of state tax commissioners. The relator's title is asserted under an appointment by the governor, duly confirmed by the Senate, on February 13, 1901, for the term ending December 31, 1904. The respondent claims title under an appointment made December 18, 1899, for the same term, which appointment, he alleges, was, on the third day of January, 1900, duly confirmed by the Senate. The facts are not in dispute. Before referring to the history of the case in detail, however, we will consider a preliminary question concerning the title of relator.

1. The plea avers that prior and subsequently to the relator's appointment he was, and that he still is, exercising the functions and receiving the emoluments of the office **719** of city assessor of the city of Detroit, an office the duties of which are incompatible with those of the office here in controversy,

and that by retaining said office he has elected not to accept the appointment of the governor. The relator asserts that this question is not properly raised; but we prefer not to deal with the case in any technical spirit, and consider the question as properly before us. The fact that the relator held the office of city assessor did not render him ineligible to appointment. It is true he might have made assessments which may be subject to review by the state board. So may a circuit judge, while sitting at circuit, render decisions which are subject to review by this court; but no one ever supposed that for this reason a circuit judge should be considered as ineligible for election as a member of this court. The continued exercise of the duties of the office of assessor of Detroit pending the determination of the relator's title stands upon similar ground. The rule is that the acceptance of a second office, incompatible with the one already held, vacates the first. This was held in *Attorney General ex rel. Moreland v. Detroit Common Council*, 112 Mich. 145, 70 N. W. 450. The result of the holding in that case is that, upon acceptance of the office relator is now contending for, he will ipso facto vacate the office of city assessor. The title to that office will therefore fail him, but not the title to this. He is not required to sit between two stools. He can have a sitting, but only one.

2. The respondent's commission purports to confer the office upon him until December 31, 1904, and it is contended by respondent's counsel that, irrespective of the question relating to the validity of the action of the Senate hereinafter referred to, the appointment is valid, for the reason that a vacancy existed in the office, and that, under section 3 of article 8 of the constitution, the power to appoint to fill a vacancy in any state office is vested in the governor, the only limitation of that power being that, in case the Senate is in session, the vacancy shall be filled by ⁷²⁰ and with the advice and consent of the Senate; and that, although the statute creating the board of state tax commissioners provides: "In case a vacancy in the office occurs otherwise than by expiration of the term, the governor shall have power to appoint to fill such vacancy at any time, and the person so appointed shall hold office until the next meeting of the legislature after such appointment, and no longer" (Act No. 154, Pub. Acts 1899, sec. 145), the power to fill the vacancy for the full unexpired term still exists, as it is not within the power of the legislature to withdraw this authority from the governor. A glance at the statutes shows

that the legislative construction of this constitutional provision from the time of its adoption has been that it related to such state officers as are named in the same article of the constitution: See 1 Comp. Laws 1897, secs. 1168, 1172. The office in question is not a constitutional office. It was, therefore, competent for the legislature to fix the term. The term fixed by this act in a certain contingency expires at the convening of the legislature.

3. The most important question in the case is whether the appointment of the respondent was regularly and irrevocably confirmed by the Senate. On the third day of January, 1900, the message of the governor nominating respondent as a member of the board was before the Senate in executive session. The committee to whom the nomination had been referred reported recommending "that the Senate advise and consent to the said nomination to office." The question being on concurring in the recommendation of the committee, the Senate concurred in the recommendation by the requisite aye and nay vote. At the same executive session a motion was made to reconsider the vote "by which the Senate advised and consented to the nomination of Mr. Oakman." The motion to reconsider prevailed. The question then recurring on the original motion to concur in the report of the committee, the Senate refused to concur. It will be seen that the question is whether the Senate at the same session, and ⁷²¹ before any action based upon the first vote has been taken, may reconsider the vote by which it has advised and consented to the nomination of the governor.

Rule 40 of the Senate provides: "When a question has been once put and decided, it shall be in order for any member to move the reconsideration thereof; but no motion for the reconsideration of any vote shall be in order unless the bill, resolution, message, report, amendment, or motion upon which the vote was taken shall be in the possession of the Senate; nor shall any motion for reconsideration be in order unless made on the same day the vote was taken, or within the next two days of the actual session of the Senate thereafter; nor shall any question be reconsidered more than once."

It is contended by the respondent that the Senate, in consenting to an appointment by the governor, is performing an executive, and not a legislative, duty, and that, when it has once given its consent, it has exhausted its power; and it is further contended that rule 40 has no application. It is con-

ceded by relator, and has been held by this court, following *Marbury v. Madison*, 1 Cranch, 137 (49), that, when the appointing power has once exercised its functions, it has no power to recall an appointment: See *Speed v. Detroit Common Council*, 97 Mich. 198, 56 N. W. 570. The question recurs whether, where an appointment, or concurrence in an appointment, is a subject of action by a deliberative body, that body may, by rules of its own, or acting under usual parliamentary rules, cast a vote upon the subject which is subject to reconsideration; for, if such course is permissible, the appointment is not complete beyond recall until the power to reconsider has been cut off by the lapse of time.

Fortunately, authorities bearing upon this subject are not wanting, and it only remains to apply them. In *Wood v. Cutter*, 138 Mass. 149, the school committee of a town had authority to elect a superintendent. The committee voted to elect relator. At the same meeting a motion to reconsider was made and carried, and the ⁷²² respondent was elected. The language of Holmes, J., is pertinent to this case: "It begs the question to say that the board had once definitively voted in pursuance of the instructions of the town meeting, and therefore was *functus officio*, and could not reconsider its vote. The vote was not definitive if it contained the usual implied condition that it was not reconsidered in accordance with ordinary parliamentary practice; and it must be taken to have been passed subject to the usual incidents of votes, unless some ground is shown for treating it as an exception to common rules."

The ruling in the case cited was reaffirmed in the case of *Reed v. School Committee*, 176 Mass. 473, 57 N. E. 961.

The case of *State v. Foster*, 7 N. J. L. 101, is a leading case on this question. The power to appoint a clerk for the county of Gloucester was vested in a joint meeting of the legislative council and general assembly. At such a session a vote was taken, and a majority voted for relator, but the presiding officer failed to declare the election under the mistaken view that a majority of all members-elect was required, and that a majority of a quorum was not enough to elect. The joint meeting then proceeded to elect respondent. The court determined the case distinctly upon the ground "that all deliberative assemblies during their session have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done." It was further said: "So long as the joint meeting were in session, they had a right to recon-

sider any question which had been before them, or any vote which they had made." This case was approved in *Whitney v. Van Buskirk*, 40 N. J. L. 467, and by the supreme court of Massachusetts in *Baker v. Cushman*, 127 Mass. 105. The case of *People v. Mills*, 32 Hun, 459, fully sustains the contention of relator. Also, see *Conger v. Gilmer*, 32 Cal. 75.

It is not clear that *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65, 22 Atl. 686, in which the majority opinion is claimed to support the contention of respondent, may ⁷²³ not be distinguished. That opinion recognizes that a convention or body may determine in advance that a ballot shall not be final; but, however this may be, we are not prepared to assent to all the reasoning in the case. The overwhelming weight of authority sustains the relator's contention, and we are convinced that the New Jersey and Massachusetts cases are sound in principle.

Judgment of ouster will be entered.

The other justices concurred.

LOSS OF ONE OFFICE BY ACCEPTING ANOTHER.

I. Incompatibility at Common Law.

- a. General Principles.
- b. What Constitutes Incompatibility.
- c. Illustrations of Incompatible Offices.
- d. Illustrations of Offices not Incompatible.

II. Incompatibility Under Statutes and Constitutions.

- a. General Principles.
- b. Offices Held Under Different Governments.
- c. Illustrations of Prohibited Offices.
- d. Offices not Prohibited—Illustrations.

I. Incompatibility at Common Law.

a. General Principles.—The rule is well settled at common law that if a person while occupying one office accepts another incompatible with the first, he, ipso facto, vacates the first office, and his title thereto is thereby terminated without any other act or proceeding: *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; *People v. Hanifan*, 96 Ill. 420; *Bishop v. State*, 149 Ind. 223, 63 Am. St. Rep. 279, 48 N. H. 1038; *Wilson v. King*, 3 Litt. 457, 14 Am. Dec. 84; *State v. Dellwood*, 33 La. Ann. 1229; *State v. West*, 33 La. Ann. 1261; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Pooler v. Reed*, 73 Me. 129; *Northway v. Sheridan*, 111 Mich. 18, 69 N. W. 82; *Attorney General v. Common Council of Detroit*, 112 Mich. 145, 70 N. W. 450; *Cotton v. Phillips*, 56 N. H. 220; *People v. Carrique*, 2

Hill, 93; *People v. Nostrand*, 46 N. Y. 375; *People v. Common Council of Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659; *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 222; *State v. Buttz*, 9 S. C. 156; *Blencourt v. Parker*, 27 Tex. 558; *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109; *Ex parte Call*, 2 Tex. App. 497; *Milward v. Thatcher*, 2 Term Rep. 81; *Rex v. Patteson*, 4 Barn. & Ald. 9; *Rex v. Hughes*, 5 Barn. & C. 886; *Rex v. Tizzard*, 9 Barn. & C. 418.

"The settled rule of the common law prohibits an incumbent of a public office from holding a second one incompatible with the first, and the acceptance of the second office will, ipso facto, terminate his right or title to the first. The authorities affirm that the act of accepting, under such circumstances, the second operates as a surrender of the first, and when the officer has been once inducted, under his election or appointment, into the second office, his subsequent resignation of the latter can in no manner serve to restore his right or title to the first office, for it is evident that when a public office once becomes vacant, a former incumbent cannot be restored to it by his own act": *Bishop v. State*, 149 Ind. 223, 63 Am. St. Rep. 285, 48 N. E. 1038; *State v. Bus*, 135 Mo. 325, 36 S. W. 636.

A board of public officers cannot refuse to recognize one elected as a member thereof on the ground that at the time of his election he held an office incompatible with the one to which he was afterward elected, and this is because one who, while occupying one office, accepts another office incompatible with the first thereby ipso facto vacates the first office: *Northway v. Sheridan*, 111 Mich. 18, 69 N. W. 82.

The appointment of a person to a second office incompatible with the first is not absolutely void; but on his acceptance of the second office and qualifying therefor, the first office is ipso facto vacated: *People v. Carrique*, 2 Hill, 93. The acceptance of and qualification for a second office incompatible with the first ipso facto vacates the precedent office, and neither quo warranto, nor other motion from the office thus vacated is necessary before the vacancy can be supplied: *State v. Bus*, 135 Mo. 325, 36 S. W. 636; *People v. Common Council of Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659; *Blencourt v. Parker*, 27 Tex. 558; *Shell v. Cousins*, 77 Va. 328.

The public has a right to know which office is held and which surrendered. It should not be left to chance, or to the uncertain whim of the office holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public: *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *State v. Brinkerhopp*, 66 Tex. 45, 17 S. W. 109. The fact that the second office is inferior to the first does not affect the rule: *Milward v. Thatcher*, 2 Term Rep. 81. And even though the title to the second office fails, as where the election is void, the rule is still the same,

nor can the officer then regain possession of his former office to which another has been elected or appointed: *Rex v. Hughes*, 5 Barn. & C. 886.

The only exception to the general rule stated above seems to be that the acceptance of an incompatible office does not operate as an absolute avoidance of a former office in any case where the person in office cannot divest himself of that office by his own act, and without the concurrence of another authority to his resignation or motion, unless such authority be privy and consenting to the second appointment: *Rex v. Patteson*, 4 Barn. & Adol. 9, 24 Eng. Com. Law, 15, wherein Parke, J., said: "Upon principle not conflicting with any of the authorities, it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could terminate by his own act simply, or unless that authority concurs in the new appointment, which would accept the surrender of, or remove from, the old one." However, the appointment of the incumbent of an office to another office by the power authorized to order an election to fill a vacancy in either office is equivalent to an agreement to accept the appointee's resignation of the former office, and, upon his qualification under the appointment, his resignation has full effect, and the office formerly held by him becomes vacant, in all cases where the two offices cannot be held by the same person: *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109.

b. **What Constitutes Incompatibility.**—It is extremely difficult to lay down any clear and comprehensive rule as to what constitutes incompatibility of offices. Perhaps the earliest rule is that laid down by Bacon who said that "offices are incompatible or inconsistent when they cannot be executed by the same person, or when they cannot be executed with care and ability, or where one is subordinate to the other or interferes with another, or where one office is under the control of another, inducing the presumption that they cannot be executed with impartiality and honesty": 3 Bacon's Abridgment, tit. "Offices," K. In *Rex v. Tizzard*, 9 Barn. & C. 418, 421, it is said that "two offices are incompatible where the holder cannot, in every instance, discharge the duties of each." In *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226, it was said, however, that "in cases where the incompatibility of offices has arisen, independently of statutory or constitutional provision, two rules are generally recognized: 1. That incompatibility does not depend upon the incidents of the offices, as upon physical inability to be engaged in the duties of both at the same time"; and "2. The test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject in some degree to its revisory power, or where the functions of the two offices are inherently inconsistent and repugnant. In such cases, it has uniformly been held that the same person cannot hold both

offices." "The sole difficulty lies in the application of the rule, and in every case the question must be determined from an ascertainment of the duties imposed by law upon the two offices. If one has supervision over the other, or if one has the removal of the other, the incongruity of one person holding both offices is apparent, and the incompatibility must be held to exist so that the acceptance of the latter vacates the former": *Attorney General v. Common Council of Detroit*, 112 Mich. 145, 169, 70 N. W. 450. A definition adopted by a number of cases is that "incompatibility in office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both, and it does not necessarily arise when the incumbent places himself for the time being in a position where it is impossible to discharge the duties of both offices": *Bryan v. Cattell*, 15 Iowa, 538; *State v. Felbleman*, 28 Ark. 424; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *People v. Green*, 5 Daly, 254, 58 N. Y. 295; *State v. Brown*, 5 R. I. 11; *State v. Butts*, 9 S. C. 156. In *People v. Green*, 58 N. Y. 304, Judge Folger, in delivering the opinion of the court, said: "Physical impossibility is not the incompatibility of the common law, which existing, one office is ipso facto vacated by accepting another. Incompatibility between two offices is an inconsistency in the functions of the two; as judge and clerk of the same court, or an officer who presents his personal account subject to audit, and officer whose duty it is to audit it. Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter, is, that from the relations and nature to each other of the two places they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not, at the same hour, be able to do the duty of each relation. The offices must subordinate, one the other, and they must per se have the right to interfere one with the other before they are incompatible at common law." "At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two—some conflict in the duties required of the officers as where one has some supervision of the other, is required to deal with, control, or assist him": *State v. Bus*, 135 Mo. 338, 36 S. W. 636.

c. **Illustrations of Incompatible Offices.**—In accordance with the rules and principles laid down in the foregoing part of this note, it has been decided that the following offices are incompatible, and that the acceptance and qualification for the second office *ipso facto* vacates the first and removes the officer therefrom without other act or proceeding: The office of justice of the peace and that of constable, sheriff, deputy sheriff, or coroner: *State Bank v. Curran*, 10 Ark. 142; *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; *Wilson v. King*, 3 Litt. 457, 14 Am. Dec. 84; Opinion of the Justices, 3 Me. 486; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Pooler v. Reed*, 73 Me. 129; the offices of justice of the district court and of deputy sheriff: *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226; and the offices of prudential committee and auditor of a school district: *Cotton v. Phillips*, 56 N. H. 220; of city councilman and city marshal: *State v. Hoyt*, 2 Or. 247; of state solicitor and member of Congress: *State v. Butz*, 9 S. C. 156; of postmaster and judge of the county court: *Hoglan v. Carpenter*, 4 Bush, 89; of mayor of a city and governor of the state: *Attorney General v. Common Council of Detroit*, 112 Mich. 146, 70 N. W. 450; of major general and colonel of a company inseparably attached to a brigade of the division commanded by such major general: *State v. Brown*, 5 R. I. 1; or that of town clerk and alderman: *Rex v. Tizzard*, 9 Barn. & C. 418.

d. **Illustrations of Offices not Incompatible.**—On the other hand, under the same rules and upon the same principles many offices have been held not to be incompatible under the reasoning that in order to render two offices incompatible at common law, so that the acceptance of one would *ipso facto* vacate the other, the functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices. But where one office is not subordinate to the other, and the relations of the one to the other are not repugnant and inconsistent, then the two are not incompatible. Thus the office of supervisor and that of deputy circuit clerk are not incompatible so as to make the discharge of the duties of the two offices by the same person repugnant: *State v. Feibleman*, 28 Ark. 424. There is no incompatibility between the offices of crier and messenger of the district and circuit courts, and the same person may hold, perform the duties, and receive the salary of both without creating a vacancy in either: *Preston v. United States*, 37 Fed. 417. Under the same rules the offices of clerk of the district court and of court commissioner are not incompatible: *Kenney v. Goergen*, 36 Minn. 190, 31 N. W. 210. Nor is the office of district attorney and that of captain in the volunteer service of the United States army: *Bryan v. Cattell*, 15 Iowa, 538; nor the office of district clerk and that of collector of the district: *Howland v. Luce*, 16 Johns. 135; nor that of member of the assembly and clerk of the court of special

sessions: *People v. Green*, 5 Daly, 254, 58 N. Y. 296; nor that of school director and that of judge of election: *In re District Attorney*, 11 Phila. 645. The office of chief burgess in a borough office is not incompatible with either that of justice of the peace or notary public, the latter being state officers: *Commonwealth v. Shundle*, 19 Pa. Co. Ct. Rep. 258. The offices of deputy sheriff and school director in the same city are not incompatible: *State v. Bus*, 135 Mo. 325, 36 S. W. 636. The office of clerk of a city, and that of clerk of the district court of the county in which such city is situated are not so incompatible that the acceptance of the latter by a person holding the former ipso facto vacates the first-named office: *Abry v. Gray*, 58 Kan. 149, 48 Pac. 577. "While it seems to be bad policy, to confer two lucrative offices on the same person at the same time, and while if charged with the duty of making the law we might not hesitate to declare that no person should be permitted to hold both these offices together, yet we are unable to say that there is any such incompatibility in the functions of the offices of clerk of the district court and clerk of a city as prohibits one person from holding both at the same time": *Abry v. Gray*, 58 Kan. 151, 48 Pac. 577. The duties of an examiner in the department of justice and of special assistant attorney are distinct and different, and therefore one person may hold both offices: *Crosthwait v. United States*, 30 Ct. of Cl. 300.

II. Incompatibility Under Statutes and Constitutions.

a. **General Principles.**—In order to preserve a pure public policy, state constitutions and statutes frequently provide that one and the same person shall not, at the same time, hold an office of profit or trust both under the state and under the national government, or that persons holding judicial offices shall not, at the same time, hold other offices of trust or profit, or that the same person shall not, at the same time, hold two offices of profit or trust, or the like. Such provisions cover substantially the same ground as the common-law inhibition against the same person holding incompatible offices at the same time, and they also, in many cases, go further, and arbitrarily prohibit the holding of two offices which, at common law, would not be deemed to be incompatible. Hence, if the holding of two offices by the same person, at the same time, is inhibited by the constitution or statute, a forbidden incompatibility is created similar in its effect to that of the common law, and as in the case of the latter, it is well settled by an overwhelming array of authority that the acceptance of a second office of the kind prohibited operates, ipso facto, to absolutely vacate the first office: *Dickson v. People*, 17 Ill. 101; *Dalley v. State*, 8 Blackf. 329; *Creighton v. Piper*, 14 Ind. 182; *Lucas v. Shepherd*, 16 Ind. 368; *Howard v. Shoemaker*, 35 Ind. 111; *Bishop v. State*, 149 Ind. 223, 63 Am. St. Rep. 279, 48 N. E. 1038;

State v. Newhouse, 29 La. Ann. 824; State v. Arrata, 32 La. Ann. 193; State v. Dellwood, 33 La. Ann. 1229; State v. West, 33 La. Ann. 1261; State v. Draper, 45 Mo. 355; State v. Bus, 135 Mo. 325, 36 S. W. 636; State v. Sadler, 25 Nev. 131-173, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128; People v. Common Council of Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; People v. Board of Fire Commrs., 76 Hun, 146; 27 N. Y. Supp. 548; State v. Mason, 61 Ohio St. 513, 56 N. E. 468, Shell v. Cousins, 77 Va. 328. "Where the holding of two offices by the same person at the same time is forbidden by the constitution or a statute, the effect is the same as in the case of holding incompatible offices at common law. In such case the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In each case the holding of two offices is illegal. It is made so in one case by the policy of the law, and in the other by absolute law. In either case the law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied": State v. Bus, 135 Mo. 330, 36 S. W. 636. If an officer holding a public office accepts, and has been inducted into a second office incompatible with the first, his title to the first terminates, and cannot be revived by his subsequent resignation of the second, and after the first office becomes vacant the former incumbent cannot be restored to it by his own act. The same rule applies whether the offices are incompatible or not, if the constitution forbids the same person to hold both at the same time: Bishop v. State, 149 Ind. 223, 63 Am. St. Rep. 279, 48 N. E. 1038; People v. Common Council, 77 N. Y. 503, 33 Am. Rep. 659; Shell v. Cousins, 77 Va. 328; State v. Bus, 135 Mo. 325, 36 S. W. 636. The question of holding two offices at the same time does not depend, as at common law, upon the incompatibility of the two offices alone, but upon the positive language of the constitution prohibiting it, and the acceptance of the second office by one already holding a public office operates ipso facto to vacate the first. While the officer has the right to elect which of the two he will retain, his election is deemed to be made when he accepts and qualifies for the second: State v. Thompson, 122 N. C. 493, 29 S. E. 720. This being the rule, no judicial determination is generally necessary to declare the vacancy in the first office, for the moment that the officer accepts a new office, forbidden and incompatible with the first, the old one becomes vacant by such act, as an operation of law: People v. Bus, 135 Mo. 325, 36 S. W. 636; People v. Green, 58 N. Y. 304. "The moment he accepted the new office the old became vacant. His acceptance of the one was an absolute determination of his right to the other, and left him no shadow of title, so that neither quo warranto nor amotion was necessary": People v. Common Council, 77 N. Y. 503, 510, 33 Am. Rep. 659. "It is not necessary that there should be a judgment of amotion when an office has been forfeited by the acceptance of an incompatible

office. The acceptance of an incompatible office under the constitution actually vacates any other office which the officer may hold. The rule has been stated in broad and comprehensive and unqualified terms that the acceptance of an incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor amotion being necessary. . . . It is the acceptance of the incompatible office and holding the same for even so brief a time that forfeits the first office, and creates an actual vacancy in the same, without any proceeding to remove him whatever, by quo warranto or otherwise": *Shell v. Cousins*, 77 Va. 328, 331.

Although it thus seems that no proceeding is actually necessary to oust such officer, yet quo warranto may be resorted to in such case. Thus, if a state constitution declares that no person shall hold more than one lucrative office at the same time, a person holding a state office who subsequently accepts a United States office thereby terminates his right to hold the state office and may be ousted therefrom upon information in the name of the state: *Bishop v. State*, 149 Ind. 223, 63 Am. St. Rep. 279, 48 N. E. 1038.

In *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239, it was maintained that under a constitutional provision that no person should hold more than one lucrative office at the same time, two offices purely municipal, although lucrative in the ordinary sense of the term, were not within the meaning of the provision. But this doctrine was denied, and exactly the contrary rule maintained in *State v. Board of Education* (N. J. Sup. Ct.), 23 Atl. 670.

Two offices are rendered incompatible precluding one person from holding both, by a valid legislative provision vesting in the incumbent of one the power to remove the other, even though the contingency upon which the power is to be exercised is remote: *Attorney General v. Common Council*, 112 Mich. 145, 70 N. W. 450. And in such case the fact that the mayor of a city was elected to the office of governor after a public declaration by him of an intent to continue to perform the duties of mayor is no reason why the office of mayor should not be declared vacant: *Attorney General v. Common Council*, 112 Mich. 145, 70 N. W. 450.

Under a provision of a state constitution that no senator or representative shall, during the term for which he is elected, hold any office under the authority of the United States or of the state except that of postmaster, the disability of a member of the legislature to hold another office does not cease until the expiration of the full term for which he was elected, although he resigns before that time: *State v. Sutton*, 63 Minn. 147, 56 Am. St. Rep. 459, 65 N. W. 262. In *De Turk v. Commonwealth*, 129 Pa. St. 151, 15 Am. St. Rep. 705, 18 Atl. 757, it was held, however, that where a person was holding a national and a state office, made incompatible by state

constitution, but before answer and issue joined in quo warranto to oust him from the state office, he formally resigned and surrendered the national office, his title to the state office was thereby again perfected, so that he could not be ousted therefrom by judgment in the quo warranto proceeding.

b. **Offices Held Under Different Governments.**—The only exception which exists to the rule considered above is where the first office is held under a different government from that which confers the second; and perhaps such exception is applied only when a person holding office under the national government accepts office under a state government incompatible with the former under provisions in the state constitution. In such case it seems that where a person elected or appointed to a state office who is already holding a national office, and these offices are made incompatible by state constitution his acceptance and entering upon the duties of the state office do not create a vacancy in the national office, because the state cannot declare the latter office vacant. But the officer's right to hold the state office may be questioned by quo warranto if he attempts to hold both. "If the title to these offices were derived from a common source, it might well be held that an acceptance of the second office was an implied resignation and vacation of the first. This is the common-law rule, and the current of authority in this country sustains it. But the state cannot declare the federal office vacant, nor remove the incumbent from it. It may, however, enforce the constitutional provision by proceedings to test his title to the office he holds under its laws, and it may remove him from that office, if he does not surrender the office he holds under the government of the United States. It follows from these views that at the time of the institution of this suit *De Turk* had not an indefeasible title to the office of county commissioner, because he was then in actual possession, and exercising the functions, of an office of trust and profit under the United States": *De Turk v. Commonwealth*, 129 Pa. St. 151, 15 Am. St. Rep. 705, 18 Atl. 757. To the same effect is the case of *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197, 4 N. E. 439, 5 N. E. 672, deciding that under a constitutional inhibition of a holding by one of more than one lucrative office at the same time a person holding the federal office of postmaster, to which he was first appointed, cannot hold the salaried office of township trustee to which he is elected or appointed under the state government, and if he persists in attempting to hold both offices, he may be ousted from the latter by quo warranto proceedings in the state court. In passing upon this question, Judge Elliott said: "The state courts have authority to expel him from the office of township trustee, but not from the office held by appointment from the federal government. Our courts cannot decide upon the right of an appointee of the national gov-

ernment, but they can decide upon the right of one asserting a title to an office under the laws of the state. Within the powers delegated to it the federal government is supreme, and this necessarily carries the authority to determine upon the qualifications of its officers and their right to hold office. As our courts have no authority to expel an incumbent from a federal office, they are powerless to control a man who attempts to defy our constitution by holding both a federal office and a state office, unless they have authority to expel him from an office held under the laws of the state, notwithstanding the fact that he may have entered into the state office last. We entertain no doubt that our courts do possess power to oust a man from a state office who undertakes to hold it in defiance of our constitution. This doctrine is ably and decisively declared in *Hoglan v. Carpenter*, 4 Bush, 89. If a man persists in clinging to a federal office, our courts can and will compel him to loosen his hold upon an office created by the state. If he perseveres in his effort to violate one fundamental law by holding two offices, the sure penalty will be the loss of that over which the state has jurisdiction. He may, if he will, surrender the federal office and retain that created by the state, but he cannot retain both in defiance of the constitution. If he elects to hold the federal office, he must surrender the state office. The courts will coerce obedience to the constitution, and will not permit men to hold office in violation of its provisions. It is doubtless the general rule that when a man accepts an office held under the state, he vacates another held under the same sovereignty. But the reason of the rule fails when applied to offices held under different sovereignties, and where the reason for the rule fails, so also does the rule. There is reason for the rule where the offices emanate from the same government, but none where the offices are created by different governments. The national law neither creates nor governs a state office, neither inducts the officer into office nor expels him from it, neither fixes his qualifications nor prescribes his disabilities. On the other hand, the state law exerts no dominion over the federal officer as an officer, neither prescribes his qualifications nor declares his disabilities, and it is, therefore, logically inconceivable that the acceptance of an office existing under a state law vacates an office existing under a national law. Where, as here, a man elected to a state office persists in retaining a federal office, actually remains in it, enjoying its emoluments and discharging its duties, he does not, in legal contemplation and certainly not in fact, vacate it by entering into an office created and existing under the laws of the state, and for this plain reason the laws of the state do not operate upon federal offices. Our laws do not extend to offices created by the general government, and no act that an officer acting under our laws can do can vacate an office upon which our laws do not

operate. Nothing done under our laws can operate where our laws are without effect. We must hold that a man can be expelled from a state office who persists in holding one given him by the federal government, or we must concede that the courts of Indiana cannot control a citizen who assumes to hold office in direct opposition to, and violation of, the constitution. This concession will not be made": *Foltz v. Kerlin*, 105 Ind. 221-223, 224, 55 Am. Rep. 199, 200.

While this rule is apparently sound when applied to a similar state of facts, namely, when a person in possession of a national office accepts a second office under the state government, for if the order of events be reversed and the national office is accepted last the rule is uniform that in such event the first or state office must be declared vacant ipso facto upon acceptance of the national office. Cases are numerous in which under express constitutional or statutory provisions, the state office has been declared vacant immediately upon the subsequent acceptance of and qualification for an office under the United States government by the incumbent of the state office: *People v. Leonard*, 73 Cal. 230, 14 Pac. 853; *Dickson v. People*, 17 Ill. 191; *Bishop v. State*, 149 Ind. 223, 63 Am. St. Rep. 279, 48 N. E. 1038; *State v. Sadler*, 25 Nev. 173, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128; *People v. Common Council*, 77 N. Y. 503, 83 Am. Rep. 659; *State v. Mason*, 61 Ohio St. 513, 56 N. E. 468; *State v. De Gress*, 53 Tex. 387; *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 338.

c. *Illustrations of Prohibited Offices.*—The general rule that under state constitutions or statutes prohibiting one person from holding two offices at the same time, the acceptance of a second office ipso facto vacates the first, may best be illustrated by the following applications of it: If the constitution provides that no person holding any lucrative office under the state shall be a member of the general assembly, one who accepts an election to the assembly while holding the office of circuit judge vacates the latter office: *State v. Draper*, 45 Mo. 355. Under a constitution providing that no person holding an office of honor or profit under the United States shall hold any office of honor or profit under the state, a person who is a director of a state deaf and dumb asylum vacates such office when he accepts that of United States marshal: *People v. Dickson*, 17 Ill. 191. If a constitution provides that no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under the state, a person holding such latter office vacates it by accepting the incumbency of any lucrative national office, as when he is supervisor he accepts the position of postmaster: *People v. Leonard*, 73 Cal. 230, 14 Pac. 853. As, when state senator accepting appointment as paymaster in the United States army. By accepting the

last office he ipso facto vacates the first: *State v. Sadler*, 25 Nev. 132, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128. Or if the constitution provides that no person shall hold more than one lucrative office at the same time, a person holding a state office, who subsequently accepts another office under the United States, both of them being lucrative, thereby terminates his right to hold the state office: *Bishop v. State*, 149 Ind. 223, 63 Am. St. Rep. 279, 38 N. E. 1038. Under such provision the office of mayor of a city cannot legally be held by one who at the time continues a United States army officer on the retired list: *State v. De Gress*, 53 Tex. 387. The office of county commissioner and that of postmaster are incompatible under a constitutional provision that any person holding an office of profit or trust under the United States cannot, at the same time, hold an office in the state to which a salary is attached: *De Turk v. Commonwealth*, 129 Pa. St. 151, 15 Am. St. Rep. 705, 18 Atl. 757. And under a constitutional inhibition against holding more than one lucrative office at the same time a person cannot hold the salaried office of township trustee and postmaster at the same time: *Folts v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197. Where the constitution provides that no person holding office under the authority of the United States shall be eligible to or have a seat in the general assembly, an assemblyman who accepts an appointment to a national judgeship ceases to be a member of the general assembly, and is not entitled to salary as such thereafter: *State v. Mason*, 61 Ohio St. 513, 56 N. E. 468. If the charter of a city prohibits an alderman from holding any other office, and provides that by his election to, and acceptance of, another office, his office of alderman shall become vacant, an alderman who is elected to Congress and accepts the office thereby vacates his office of alderman: *People v. Common Council*, 77 N. Y. 503, 33 Am. Rep. 659. Under a statute providing that no person shall at the same time fill a municipal and a county office, a person who has been elected city tax collector vacates that office by accepting the office of deputy sheriff: *Keating v. City of Covington (Ky.)*, 35 S. W. 1026. A commissioner of appraisal is a public officer within a statute forbidding a justice of the supreme court to hold any other office of public trust: *In re Gilroy*, 42 N. Y. Supp. 640, 11 App. Div. 65. Under a constitution forbidding any person holding an office of trust or profit under the United States from at the same time holding a state office, a United States centennial commissioner cannot, at the same time, be elected to and hold the office of presidential elector: *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538. Under a constitution providing that no person shall hold more than one office of trust or profit at the same time, the office of member of the board of health is vacated by accepting the office of jury commissioner: *State v. Arata*, 32 La. Ann. 193,

or the office of sanitary policeman while a member of the board of health: *State v. Newark*, 8 Ohio Com. Pl. 344, 6 Ohio N. P. 523; or by accepting the office of police commissioner, the office of jury commissioner is vacated: *State v. Newhouse*, 29 La. Ann. 824; or by accepting the office of member of the school board or tax collector another office of profit or trust is vacated: *State v. Dellwood*, 33 La. Ann. 1229; *State v. West*, 33 La. Ann. 1261. Under a constitution providing that no person holding any office of trust or profit under the United States, under the state, or under any other state or government shall hold any office of trust or profit under the state. A county commissioner by accepting and qualifying for the office of member of the county board of education ipso facto vacates the former office: *State v. Thompson*, 122 N. C. 493, 29 S. E. 720. If the constitution prohibits one person from holding two lucrative offices at the same time, one who holds the office of county recorder vacates it if he accepts that of county commissioner: *Dailey v. State*, 8 Blackf. 329; or if holding the office of county commissioner he accepts that of deputy treasurer: *Lucas v. Shepherd*, 16 Ind. 368; or if holding the office of prison director, he accepts the office of mayor: *Howard v. Shoemaker*, 85 Ind. 111. If a constitution provides that sheriffs shall hold no other office, the acceptance of any other office by a sheriff will vacate the office of sheriff: *Shell v. Cousins*, 77 Va. 328.

d. **Offices not Prohibited—Illustrations.**—While the common-law rule that the acceptance by one who holds a public office of a second public office incompatible therewith operates ipso facto as a resignation of the first is acknowledged to obtain everywhere when the holding of two offices by one person at the same time is forbidden by the constitution or statute, yet some instances are found where the holding of two offices by the same person has not been deemed within such inhibition. Thus, a deputy sheriff is not a state officer within the meaning of a constitutional provision that "no person shall at the same time be a state officer and an officer of any county, city, or other municipality." Hence, such inhibition does not apply to a deputy sheriff of a city who also holds the office of school director in such city: *State v. Bus*, 135 Mo. 325, 36 S. W. 636. Under a constitutional provision that no person shall hold more than one lucrative office at the same time, it has been maintained that offices purely municipal, as that of city councilman, although lucrative in the ordinary sense of the term, are not within the meaning of such provision. Hence, a person holding the office of state prison director may also accept and hold the office of city councilman: *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239.

A bridge commissioner appointed under a statute creating the position is not an officer within the meaning of that term as used in the constitution, but merely an agent to perform certain duties.

Hence, a member of the legislature which passed such statute is not disqualified to serve during the term for which he is elected as assemblyman to serve as such bridge commissioner: *State v. George*, 22 Or. 142, 29 Am. St. Rep. 586, 29 Pac. 356. If the constitution provides that no person shall hold at the same time more than one civil office, except that of justice of the peace, county commissioner, notary public, and postmaster, a person holding any one of the offices named may hold and exercise any other office: *Gaal v. Townsend*, 77 Tex. 464, 14 S. W. 365. A statute making it the duty of the sheriff of a county to perform the duties of city marshal in a city within his county for which he receives extra pay is not in conflict with a constitutional provision that no person shall hold or perform the functions of more than one office under the government of the state at the same time: *Attorney General v. Connors*, 27 Fla. 329, 9 South. 7. A member of a municipal council is not a state officer, and the acceptance of such office does not vacate the office of jury commissioner. The holding of the two offices at the same time is not incompatible nor in violation of the constitution prohibiting one from holding at the same time two state offices: *State v. Taylor*, 44 La. Ann. 783, 11 South. 132. Under a constitutional provision that "no member of the legislature shall receive any civil appointment within this state, or the Senate of the United States, from the governor, the governor and Senate, or from the legislature, or from the city government during the time for which he shall have been elected," a member of the assembly may be appointed a clerk of the district court of a city by the justice thereof, as such justice is not an officer of the city government: *Stewart v. Mayor of New York*, 44 N. Y. Supp. 575, 15 App. Div. 548. Or under such constitutional provision a member of the assembly may be appointed to and hold the office of deputy clerk of the court of special sessions: *People v. Green*, 58 N. Y. 296.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**WELLER v. CHICAGO, MILWAUKEE AND ST. PAUL
RAILROAD COMPANY.**

[164 Mo. 180, 64 S. W. 141.]

NEGLIGENCE—RAILROAD'S DUTY TO LOOK AND LISTEN.—One about to cross a railroad track must look and listen, and if there are any difficulties in the way of his seeing and hearing must stop, and if, by acting in accordance with such duty he could have discovered the approach of the train, he is guilty of negligence contributing to any injury received from a failure to perform such duty. (p. 602.)

NEGLIGENCE—RAILROADS.—IT IS PRESUMED that a person about to cross a railroad track looks, listens, and exercises proper care. (p. 602.)

NEGLIGENCE—RAILROADS—PRESUMPTIONS.—A person about to cross a railroad track has a right to presume that the company will obey an ordinance of the city requiring headlights on moving trains after sunset, and that a bell be rung on the engine on all such trains eighty rods from the crossing and be kept ringing until the train has passed such crossing, and he is entitled to recover for an injury received at such crossing, unless it conclusively appears that he was guilty of contributory negligence. (p. 603.)

NEGLIGENCE—RAILROADS.—TO OVERCOME THE PRESUMPTION that a person about to cross a railroad track exercised due and proper care, and to defeat his action for an injury received, the burden of proof is upon the railroad company to show a failure on his part to exercise ordinary care to avoid the injury and that his failure to exercise such care was the proximate, direct, and immediate cause of the injury, without which it would not have been received. (p. 604.)

NEGLIGENCE—RAILROADS—EVIDENCE.—Before it can be declared as matter of law that a person attempting to cross a railroad track is guilty of negligence contributing to his injury, the evidence must be substantially all one way, and not such that reasonable minds might differ with respect thereto. (p. 607.)

JURY TRIAL—INSTRUCTIONS, LENGTH OF.—A judgment cannot be reversed because an instruction given was too lengthy. (p. 608.)

JURY TRIAL—REFUSAL OF CUMULATIVE INSTRUCTIONS.—REFUSAL TO GIVE INSTRUCTIONS the points in which have been already given in other instructions is not reversible error. (p. 608.)

TRIAL—ORDER OF EVIDENCE.—The order in which testimony shall be introduced is almost entirely within the discretion of the court, and error committed in the order of its introduction does not justify a reversal of the judgment, especially when such error is not prejudicial. (p. 609.)

EVIDENCE.—EXPERT WITNESSES may testify to the rate of speed at which a particular train of cars moved from the time or distance necessarily taken in stopping it. (p. 609.)

F. Hagerman, for the appellant.

Gage, Ladd & Small, for the respondent.

186 **BURGESS, C. J.** This is an action by plaintiff, who is the widow of William P. Weller, deceased, to recover damages on account of the death of her said husband, caused, as is alleged, by the negligence of defendant. The accident occurred after sunset on the evening of the 12th of December, 1887, at a point in Kansas City, Missouri, where the Kansas City Belt Railroad (over which defendant's road is operated) crosses Fifteenth street in that city.

There have been two trials in this case, each resulting in a verdict for plaintiff for five thousand dollars. An appeal from the first judgment to this court was prosecuted by the defendant. The judgment was reversed, and the cause remanded for another trial, the case being reported in *Weller v. Chicago etc. Ry. Co.*, 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532. The case was again tried at the April term, 1897, of the circuit court of Jackson county, resulting in a judgment for plaintiff for five thousand dollars, from which defendant appeals.

The negligent acts upon which the case is grounded are, the violation of section 5 of chapter 37 of the revised ordinances of the city limiting the rate of speed of railroad trains to six miles per hour; the violation of section 2 of the same chapter, requiring to be placed upon every moving train after sunset "one large lamp, headlight, or lantern, conspicuously placed in front of the train facing the direction in which the same may be moving," and in failing to ring the bell eighty rods from the crossing or keep it ringing until the train passed

the crossing. The defenses were a general denial, and a plea of contributory ¹⁸⁷ negligence on the part of deceased.

Fifteenth street was one of the principal thoroughfares of Kansas City, and runs east and west. At the point where the accident occurred, it is crossed by the line of defendant's railroad, which runs from northeast to southwest and crosses the highway at an angle of about thirty-three degrees. It was six hundred and twelve and one-half feet from this intersection northeast along the line of the railroad to the limits of Kansas City. Fifteenth street was one hundred feet in width. A double-track cable railroad occupied about fifteen feet in width in the center of the street. The street was not at the time graded to its full width, but had been surfaced for a distance of eighteen or nineteen feet on the north and south sides of the cable roadway. This space on either side of the cable railroad was used for vehicles. From the intersection of the railroad and the highway to the eastern city limits, along the line of Fifteenth street, was five hundred and sixteen feet. Askew avenue, the first north and south street west (toward the city), is one hundred and seven feet from the intersection of the highway and the west rail of the railroad track. On the northeast corner of Askew avenue and Fifteenth street there were two small frame houses, facing on Fifteenth street, with a frontage of about forty or fifty feet. From the point of intersection the railroad ran in a northeasterly direction in a straight line for a distance of about eighteen hundred feet, and then curved toward the east. A person standing in Fifteenth street sixty to eighty yards west of the intersection of the west rail of the railway and the highway could see the entire track for a distance of one thousand feet or more from the point of intersection northeast. Standing at a point in Fifteenth street twenty-five feet east of the east line of the small houses mentioned, one could see the track for a distance of eight or nine hundred feet from the point of intersection; standing in Fifteenth ¹⁸⁸ street on the east line of Askew avenue, he would have an unobstructed view of the track for a distance of six hundred feet northeast from the point of intersection. A railroad from Kansas City to Independence, called the "Dummy Line," had its western terminus at a small station on Askew avenue, two or three hundred feet north of Fifteenth street. From this station this line of railroad ran north to Fourteenth street, thence east on Fourteenth street

to the city limits, and then bore off in a northeasterly direction. The railroad and tracks, at the location in question, which were used by the defendant, were owned by the Belt Line Railroad Company.

The deceased lived on Fifteenth street, three or four miles east of the crossing. He had been to the city, and was on his way home, driving a single horse or pony and light wagon along Fifteenth street, on the north side of the cable track. It was dark and shortly after 6 o'clock. As he approached the crossing, a cable train bound east stood on the south track of the cable road, about fifty feet west of the west rail of the defendant's railroad. Another cable train bound west stood on the north track of the cable railroad about the same distance east of the intersecting point. It was a standing rule of the cable company that all its trains approaching this crossing should stop, and the conductor go ahead and see if the crossing was clear, and if so, then signal them to come on; this, whether a train was or was not within sight or hearing, or expected on the Belt Line track. But on this occasion it happened that the conductor of the east-bound cable train had rung his bell as a signal to the gripman to stop, as the gripman supposed, to allow some passengers to alight. A cable train passes over this crossing every two and a half minutes. Both these cable trains at the time had bright headlights in front, whose natural effect was to dazzle one's eyes in front of them and intensify the darkness at a distance from them so that opaque objects were ¹⁸⁹ not easily distinguished until they came within their radius. Collins, the gripman on the east-bound cable train, was a witness for the plaintiff. He was a gripman for several months, had been superintendent of the Eighteenth street cable line, and familiar with the operation of switch-engines and their lights in Chicago. The defendant's railroad was not completed, and one of its construction trains, whose crew had been at work five or six miles east of the city, was approaching from the northeast, bringing the men from their work. The train was composed of three or four cars and an engine hauling them, the engine backing at the time, so that the tender was at the front of the train. The defendant's witnesses testified that there were two box-cars and a passenger-coach. Stone and Anderson, who were mechanics employed in the construction of defendant's roundhouse, and who were in the rear car coming home from their work, testified

that there was no coach upon the train, but that they were all box-cars, and unlighted.

Collins testified that when he first saw Weller, the latter was abreast of the cable-car, driving east on the wagon road north of the cable track. The cable-cars were standing there—how long is left uncertain. Collins also testified: "It might be probably a minute, more or less; that I could not be exact upon." Collins then knew that a train was coming, because about that time he first heard its rumble. Collins heard a bell twice, very low. It did not ring continuously; he heard it once before and once after he saw Weller. It did not sound like a locomotive bell; more like a cow bell, so that he was not certain from its sound whether the train which he heard was upon the Dummy Line or the Belt Line.

Before Weller passed Collins, the latter had heard the noise of his horse's hoofs or his wagon, perhaps one hundred feet back. The ground was hard.

As Weller passed, Collins hallooed to him, but Weller ¹⁸⁹⁰ paid no attention. Collins shouted to him again, and Weller then looked back over his right shoulder toward the southwest, then turned back his face to the east, and almost immediately was under the train. When Collins first shouted, he could see neither train nor light on the train, although he was looking for them. He saw no train and discerned no light until after he had shouted to Weller the second time. When he at last saw it, it looked to him like a small light coming from an ordinary brakeman's lantern. The train was stopped so that its rear end was at the place where the accident occurred. It must have run about one hundred and forty feet, or the length of the train. Collins testified that the train was running ten or twelve miles an hour. Stone and Anderson, who were riding on it in accordance with their daily custom for several months, testified that its speed was from twelve to fifteen miles an hour.

The witnesses for the defendant, who testified on the subject, including the fireman and engineer of the train, testified that the train was running not to exceed six miles per hour. Weller was driving his horse in a trot, at a rate of speed, according to the estimates of different witnesses, of five miles an hour, or five or six miles an hour—between six and eight miles an hour.

Reach, a witness for the defendant, testified that he heard the train and the whistle and the bell, and saw a small head-

light. Montelius said he heard the train, whistle, and bell, and saw a small headlight. Bilty, the engineer, said there was a taillight on the tank, and that he whistled beyond Twelfth street. Anderson testified that he heard no whistle, wondered at it, and spoke of it at the time. Neither did Collins hear any whistle. Fitzgerald, the fireman, testified that he ¹⁹¹ rang the bell, and that it was a good one, and that the engineer whistled.

That train usually stopped just before it reached the crossing, but for some reason it failed to observe its usual custom on this occasion.

Two witnesses on behalf of the defendant testified as to the conduct of Weller immediately before he reached the point opposite the cable-car. They were Reach and Montelius. Weller's exact location when they first observed him is left somewhat in doubt, but if Montelius was accurate, he first saw Weller when the latter was at the east line of Askew avenue, or possibly one hundred feet west of that line.

Collins, for the plaintiff, testified that he was unable to state that Weller did not, after he passed him, turn his head in a slight degree; that it would be impossible for him to tell which way he turned his eyes when Weller's back was to him; that Weller might have looked in the direction of the approaching train and he (Collins) not have noticed it; that the Belt Line track was at such an angle that he could turn his eyes and look in its direction.

McMullen, who was on the cable-car with Collins, and who was a witness for the defendant, testified that Weller might have turned his head and the movement escaped his notice; that on account of the angle made by the crossing, Weller would not have been obliged to turn his head in order to look up the track to the northeast; that a person could see up the track without turning his head, and by turning the eyes. Weller's sight and hearing were good.

Fitzgerald, the fireman, testified for the defendant that the train was stopped as quick it could possibly be done. Dwyer and O'Brien, experienced railroad men, testified on behalf of plaintiff that a train of this kind, running at a rate ¹⁹² of six miles an hour, might have been stopped in from thirty-five to sixty feet. The plaintiff introduced in evidence an ordinance of Kansas City regulating the moving of trains within the limits of the city.

Over the objection and exception of defendant the court instructed the jury in behalf of plaintiff as follows:

"1. The jury are instructed that at the time said William P. Weller was injured, the law imposed upon its servants, agents, and employés of the defendant, while running, conducting, or managing the locomotive and train of cars in question, the following duties: That they should not move the same while within the city limits of the city of Kansas at a greater rate of speed than six miles an hour; that they should not run and move said locomotive and train of cars within the city of Kansas, between sunset and sunrise, without having at least one large lamp, headlight, or lantern in a conspicuous place in front of the same, facing the direction in which the same was moving; that they should immediately upon entering the city of Kansas cause the bell on the engine to be rung, and keep the same ringing until the same should have crossed Fifteenth street. And if the jury believe from the evidence that the agents, servants, and employés of defendant, while running, conducting, or managing said locomotive and train of cars upon the occasion referred to, failed to perform any one or more of the duties specified in this instruction, such failure was negligence. And if you believe from the evidence that in consequence of such negligence any one or more of the particulars hereinbefore mentioned, the deceased received the injuries which resulted in his death, your finding should be for the plaintiff, unless you further believe from the evidence that the deceased was guilty of negligence which contributed to the injury. And the burden of proving contributory negligence ¹⁹³ on the part of William P. Weller rests on the defendant, and unless the defendant has proven such contributory negligence by a preponderance of the evidence, you cannot find for the defendant on that ground.

"2. The jury are instructed that if they believe from the evidence that Fifteenth street, at the point where the railroad tracks used by the defendant cross it, was a public street of the city of Kansas, and a thoroughfare used by the public for the purpose of travel to such an extent as to greatly enhance the danger of collisions and accidents on said crossings, that it was the duty of the servants, agents, and employés of defendant, in managing or running said locomotive and train of cars, to exercise a degree of care in the operation of said train commensurate with the danger of collisions reasonably to be apprehended at that location.

"And if the jury further believe from the evidence that the agents, servants, and employes of defendant failed to exercise such commensurate degree of care in the movement of such locomotive and train of cars as it approached and passed over said crossing, either by moving the same at, considering the locality, a dangerous rate of speed, or without a large lamp, headlight, or lantern in a conspicuous place in front of said locomotive, facing the direction in which the same was moving, or without keeping the bell upon such locomotive ringing from the time said locomotive reached the city limits until it had crossed said Fifteenth street, such failure in any of said particulars constituted negligence. And if you believe from the evidence that such commensurate degree of care on the part of the agents, servants, and employes of defendant moving said train required that there should be a light upon said locomotive or train of cars sufficient to warn travelers up said Fifteenth street of its approach, and also required that there ¹⁸⁴ should be a bell upon said locomotive sufficient or adequate, when rung, to give timely notice of the approach of such locomotive and train to such traveler, and if you further believe from the evidence that said locomotive and train had no sufficient light, or that said locomotive had no such sufficient or adequate bell, you are instructed that such failure to exercise such a degree of commensurate care in any one or more of the particulars herein mentioned constituted negligence.

"And in passing upon the question as to whether the agents, servants, and employes of the defendant were or were not negligent in running or managing said locomotive and train in any of the particulars aforesaid, you should take into consideration all the facts and circumstances which you may find from the evidence existing at the time when and at the place where the injury occurred. And if you further believe from the evidence that in consequence of such negligence in any one or more of the respects hereinbefore mentioned the said William P. Weller received the injuries from which he died, you will find your verdict for the plaintiff, unless you further believe from the evidence that the deceased was guilty of negligence which contributed to the injury. And the burden of proving contributory negligence on the part of William P. Weller rests on the defendant, and unless the defendant has proven such contributory negligence by a preponderance of the evidence, you cannot find for the defendant on that ground.

"3. Negligence on the part of the deceased which will prevent the plaintiff recovering in this action must be such as directly contributed to his injury, and consists of the want of ordinary care. Ordinary care means that degree of care which may be reasonably expected of ordinarily prudent persons in the situation of plaintiff's husband at and just before the time the accident occurred, and in determining whether the ¹⁹⁵ deceased was using such care, you should take into consideration all the circumstances surrounding him at the time.

"4. By the expression, 'preponderance of evidence,' as used in these instructions, is not meant the greater number of witnesses, but the greater weight of credible testimony in the case.

"5. If you find your verdict for the plaintiff, you will assess her damages at the sum of five thousand dollars."

The defendant, upon its part, prayed the court to instruct the jury as follows:

"1. The jury will return a verdict for defendant.

"2. If, by looking or listening at any time before he reached the crossing, Weller could have discovered the approach of defendant's train in time to have avoided the injury, then the plaintiff cannot recover.

"3. In this kind of a case, the mere fact that Weller was killed by defendant's railroad engine gives plaintiff no right to sue and recover damages. Before, in any event, plaintiff could recover, you must find from the greater weight of all the evidence in the case that his death was actually caused by some act of negligence on defendant's part submitted to your consideration. If it was not so caused, that is the end of the case, and the verdict must be for the defendant. Or if the actual cause of Weller's injury was a failure on his part to exercise reasonable prudence, then plaintiff cannot recover. But even if you should find that some negligence of defendant was the cause of the death, still plaintiff cannot recover if Weller failed to exercise reasonable care and prudence and thereby contributed to his injury. The difference between negligence on defendant's part, if any, and negligence, if any, on the part of Weller, is this: Defendant's negligence must be found to have been the cause of the injury, whereas Weller's negligence, if any, would defeat a recovery if it but contributed to such injury, ¹⁹⁶ even though it was not the only cause thereof and even though it occurred with negligence on defendant's part.

"4. If Weller, at no time after he got to Askew avenue, stopped, looked, or listened for approaching trains, but drove

on in a trot till the collision occurred, then your verdict must be for the defendant, no matter what other facts you may find, and regardless of what is said in any other instruction.

"5. The railroad track was in and of itself a warning of danger. The evidence in this case shows that Weller was familiar with this crossing. It was his duty to carefully look for approaching trains and to exercise reasonable care to see if they were approaching before going on the crossing. If, by the exercise of such care as ought to be reasonably expected of a man of reasonable care and prudence, he could have discovered the approach of the train before he got to the crossing, then your verdict must be for defendant, and this is so, even though you find that defendant was negligent in some respect submitted.

"6. If, by reason of darkness and because the headlight of the cable-car was directly in front of him, there was difficulty to Weller in seeing approaching trains, it was his duty to carefully listen for same; and if by reason of noise from his moving buggy his hearing was interfered with, then it became and was his duty to stop his horse and look and listen for trains. If you find that Weller did not comply with his duty, as in this instruction defined, then you must return a verdict for defendant, even though you may find that defendant was negligent in some respect submitted.

"7. If Weller at the time of his injury was driving his horse faster than a moderate gait, then the plaintiff cannot recover herein. In determining whether the gait was faster than moderate, the jury have the right to consider that he was approaching a railroad crossing, that two cable trains were ¹⁹⁷ waiting for defendant's train to pass, and all the facts and circumstances in evidence, and determine therefrom whether, in view of the place and situation, the gait of the horse was faster than moderate.

"8. Any violation of a city ordinance is negligence, and if Weller violated the ordinance of the city, read in evidence by defendant, and thereby contributed to his injury, then plaintiff cannot recover.

"9. While the court says, in instruction given at plaintiff's request, that the burden of proof is upon defendant to prove negligence on Weller's part, yet that does not mean that it must be proven directly by witnesses offered by the defendant. The court only means that, from all the facts and circumstances in evidence, whether shown by witnesses for plaintiff

or defendant, you must find from the greater weight of the testimony that there was such negligence.

"10. If, by looking and listening at any time before he reached the crossing, Weller could have discovered the approach of defendant's train in time to have avoided the injury, then the plaintiff cannot recover.

"11. Under the ordinance of the city, there was no requirement that the engine should have a headlight similar to that usually placed on the front end of the engines. The ordinances required either a large lamp, headlight, or lantern, and any one of the three was a compliance therewith.

"12. Even if you should find that the speed of the train was greater than six miles an hour, yet unless you further find from the evidence that the rate of speed in excess of six miles an hour was the cause of the injury, the question of negligence as to the rate of speed will not be considered by you.

"13. All of the instructions read to you are the court's instructions, and must be taken and considered by the jury the same as if read to you by the judge from the bench."

¹⁹⁸ The court gave all instructions asked by defendant except those numbered 1 and 2, which were refused, and defendant excepted.

It is said that the demurrer to the evidence should have been sustained, because it was the duty of deceased to look and listen, and if there were any difficulties in the way of him seeing and hearing, he should have stopped, and if, in acting in accordance with such duty, he could have discovered the approach of the train, he was guilty of negligence contributing to his injury. That this insistence is in accordance with the general rule in such cases, and is well-settled law, is abundantly shown by the numerous authorities cited by counsel for defendant in his brief. But the presumption must be indulged that deceased did look and listen before attempting to cross the track—that is, that he was in the exercise of proper care. In passing upon this question when the case was here before, Macfarlane, J., in speaking for the court, said: "In the absence of all evidence, did the jury have a right to draw the inference that deceased did what common prudence and ordinary care demanded of him? The rule of law that ordinary care requires a traveler at a railway crossing to look up and down the track, when the view is unobstructed, before venturing to cross it, is drawn from the ordinary conduct of the average of mankind in the daily affairs of life. From the same source is deduced

also a correlative rule, that, in the absence of direct evidence or rebutting circumstances, one, in attempting to cross a railroad track, will be presumed to have been in the exercise of proper care: *Petty v. Hannibal etc. R. R. Co.*, 88 Mo. 320; *Schlereth v. Missouri Pac. Ry. Co.*, 115 Mo. 87, 21 S. W. 1110; *Crumpley v. Hannibal etc. R. R. Co.*, 111 Mo. 158, 19 S. W. 820. In this case, had there been no witness to the conduct of deceased, and it had been shown that defendant was negligent in failing to comply with the ordinance requiring the train to carry a light, then the jury might ¹⁸⁹⁹ have drawn the inference that deceased looked for a train, and failed to see on account of the default of those in charge of the train. In such case the question of contributory negligence would have been one for the jury, to be determined in the light of all the circumstances": *Weller v. Chicago etc. Ry. Co.*, 120 Mo. 650, 23 S. W. 1061, 25 S. W. 532.

The same rule is announced in the case of *Buesching v. St. Louis Gas Light Company*, 73 Mo. 219, 39 Am. Rep. 503, wherein it was said that "the presumption of due care always obtains in favor of plaintiff in an action to recover damages for an injury sustained by him through the alleged negligence of another": See, also, *Petty v. Hannibal etc. R. R. Co.*, 88 Mo. 306; *Crumpley v. Hannibal etc. R. R. Co.*, 111 Mo. 152, 19 S. W. 820; *Schlereth v. Missouri Pac. Ry. Co.*, 115 Mo. 87, 21 S. W. 1110; *Meadows v. Pacific Mut. Life Ins. Co.*, 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578; *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103.

Deceased had the right to presume that the defendant would obey the ordinance of the city regulating the speed of railroad trains, and requiring to be placed on every moving train after sunset one large lamp, headlight, or lantern, conspicuously placed in front of the train facing the direction in which the same may be moving, and requiring the bell to be rung on the engine on all such trains eighty rods from the crossing, and to be kept ringing until the train passed the crossing (*Petty v. Hannibal etc. R. R. Co.*, 88 Mo. 306; *Crumpley v. Hannibal etc. R. R. Co.*, 111 Mo. 152, 19 S. W. 820; *Jennings v. St. Louis etc. Ry. Co.*, 112 Mo. 268, 20 S. W. 490; *Sullivan v. Missouri Pac. Ry. Co.*, 117 Mo. 214, 23 S. W. 149); and when these presumptions, together with the presumption that the deceased was at the time of the accident in the exercise of due care, are indulged, the plaintiff was entitled to recover unless it conclusively appeared from the evidence adduced by plaintiff,

either by the direct or cross-examination of her own witnesses, that her deceased husband was guilty of negligence contributing directly to his own injury: *Stone v. Hunt*, 94 Mo. 475, 7 S. W. 431; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Warren v. St. Louis Merchants' Exchange*, 52 Mo. App. 157. And in order to overcome the presumption and to defeat plaintiff's action, it devolved upon defendant to show by the weight of the evidence, a failure on the part of deceased to exercise ordinary care to avoid the injury, and that this failure to exercise such care was its proximate cause, and so direct and immediate that but for the want of such ordinary care the injury would not have occurred.

In the former opinion it was intimated that if it had been shown that Weller, after he passed the cable-car at Fifteenth street and Askew avenue, exercised no more care than when he got even with the cable-car, plaintiff would have had no case, and to meet this intimation, defendant, upon the last trial, introduced two witnesses—namely, Reach and Montelius. Reach stood on the sidewalk, he says, about fifteen feet east of the butcher shop which occupied one of two small houses on the northeast corner of Fifteenth street and Askew avenue. This would locate him about fifty-five feet east of that corner. He testified that: "Weller was about in front of the butcher shop when I first saw him; perhaps a little west of there"; and that from the time he saw him he just kept on going and made no stop until the engine struck him; that he saw him from the time he first heard his wagon at the butcher shop up to the time he was struck; that just as he passed the cable train some one on the grip halloed at him, but he did not seem to pay any heed, and then some one halloed again, and just before the train struck him he looked back over his right shoulder.

"Q. What attention did Weller pay, if you could see, to the approach of this train? A. Not any I could notice, unless it was at the last moment.

"Q. That was just as he was struck—just at the time he was struck? A. Yes, sir.

²⁰¹ "Q. You don't know whether he did it then or not? A. No, sir. . . .

"Q. Which way was he looking? A. Looking straight in front of him; as near as I could see he was looking directly in front of him."

On cross-examination he testified: "Q. Now, you say he was looking from the time you saw him—you saw him from

the time when they first shouted to him? A. Yes; just as he passed the cable-car, or perhaps a little before.

"Q. From that time you say he was looking east? A. Straight ahead; yes, sir.

"Q. You don't mean to say he didn't look up the track at any time after he left Askew avenue, do you? A. I don't think he did; I am positive he didn't.

"Q. Did you see him when he was at Askew avenue? A. About Askew avenue.

"Q. I thought you said you saw him as he passed the cable train, first? A. There was not very much difference in the distance between Askew avenue and where the cable train was.

"Q. How much difference do you think there was? A. Twenty-five, perhaps forty, feet.

"Q. Suppose it was fifty-seven feet; would you call that much difference in a distance of one hundred and seven feet? A. Yes, sir; that is quite a difference.

"Q. Do you mean to tell this jury that you know that Mr. Weller didn't look up the line of the Milwaukee track after he left Askew avenue? A. He didn't look up the line of Milwaukee track after he passed me.

"Q. When he passed you, how far were you from the track? A. I was standing, perhaps, within fifteen feet of the east line of those two buildings; and he didn't look up that way from the time I first saw him until the train struck him.

"Q. If he was looking east—that is, if he was facing east, going in the direction in which you state, I will ask you if, without turning his head, he could not look up that track. A. Hardly; no, sir.

"Q. He could not do it; I will ask you, if facing me, if you can see the corner of this courtroom out here, the southwest corner? A. Well, I should have to turn my head some, I should think.

"Q. Are you prepared to state, Mr. Reach, from the time he left Askew avenue, or from the time he reached that point where he could see up that track by turning his head, he never turned his head in the slightest degree, or turned his eyes up that track? A. I could not say as to his eyes. I could not say as to his eyes.

"Q. Are you able to state he didn't turn his head in the slightest degree toward the left? A. I am pretty positive he did.

"Q. You were not watching him from the time he left Askew avenue all the while. A. I was watching him from the time I heard him approaching.

"Q. You didn't see him the time before he passed you? A. Just before he passed me; yes, sir.

"Q. Did you see him when he was on Askew avenue, then? A. About the time he passed Askew avenue the first time.

"Q. Had he gotten off Askew avenue entirely when you first saw him? A. I could not be positive whether he was entirely over Askew avenue or not.

"Q. You don't know he didn't turn his head, then, before you saw him? A. No, sir, I don't; Askew avenue, I don't think at that time ran south of Fifteenth street; I don't ~~not~~ think it was cut through; it would be pretty hard to tell just where it was, when he was on Askew avenue."

The other witness, Montelius, testified that he stood at the northeast corner of Askew avenue and Fifteenth street, leaning against the banisters of the platform which ran by the house on the northeast corner, north to the Dummy Line depot on Askew avenue; that when he first heard Weller the latter was nearly opposite him—a little back of him; that he could not tell the exact distance west of him; that it must have been one hundred feet or more; that from the time he first saw him he never noticed him look in a northeasterly direction along the Belt Line tracks; that he looked straight ahead.

The substance of the testimony of these two witnesses was that they did not see or notice Weller look in the direction of the approaching train; that he seemed to be looking straight ahead.

The railroad track ran northeast from the crossing in a straight line for a distance of eighteen hundred feet before it curved to the east; at a point in Fifteenth street sixty or eighty yards west of the crossing, the view of the railroad track upon which the train was approaching was unobstructed for a distance of more than one thousand feet from the crossing; at a point in Fifteenth street on the east line of Askew avenue, one hundred and seven feet west of the crossing, a traveler would have an unobstructed view of the track for a distance of more than six hundred feet from the crossing; at a point in Fifteenth street twenty-five feet east of the east line of the small houses on the northeast corner of Fifteenth street and Askew avenue, which houses had a frontage of forty to

fifty feet (probably not more than forty), the view of the track was unobstructed for a distance of eight hundred or nine hundred feet from the crossing. On Fifteenth street, between these small houses and the crossing, there were no ²⁰⁴ obstructions of any kind, and the view of the tracks from Fifteenth street for eighteen hundred feet was clear. The railroad tracks themselves stood up from the ground on either side of them and were built upon an elevation. The railroad tracks, then, from different locations in Fifteenth street, from the crossing to a point sixty to eighty yards west of it, were at all times in full view of a traveler approaching over that space for distances varying from six hundred to eighteen hundred feet; and this allows for any temporary obstruction of the view produced by the presence of the two small houses on the corner of Askew avenue and Fifteenth street. Weller lived on the extension of Fifteenth street, three or four miles east of this point; he was accustomed to travel over it; his sight and hearing were good.

Collins, the gripman, about the same time when he first shouted to Weller, when the latter was fifty feet from the crossing, first knew that a train was approaching upon the track. He knew this from the rumble, but he had been unable to see the train or discern any light upon it up to that time, although he was watching for it. He had heard once or twice, indistinctly, a low bell, which was not rung continuously, and he was uncertain whether the bell was from a train upon the defendant's track or belonged to a locomotive upon the Dummy Line. Collins did not see the small and feeble light upon the approaching train until the second time he shouted to Weller, when the latter was within a few feet of the train—so close, indeed, that immediately after the second warning he was under its wheels.

As was said by counsel for plaintiff in his brief: "It may fairly be assumed that Weller, as he approached the crossing, heard the rumble and the low bell whose sound reached Collins' ears, and looked up the track of the defendant, whose trains alone he was liable to meet, to see if a train was approaching, ²⁰⁵ but seeing no light, for the same reason that Collins could see none, naturally concluded that the rumble and the bell came from some train on the Dummy Line to the north of him, from which he was in no possible danger, and supposed—as he might reasonably suppose—from the absence of any moving light on the defendant's track within his view,

that the crossing was clear. If it had been daylight, Weller would have seen the train, but the darkness necessarily obscuring a view of it, he, like any other traveler, would look in the proper direction for the moving light upon it, whose presence the law required, as a warning to him of its approach. To him no light meant no train, and the want of it was notice to him that he might proceed safely on his way."

It is not sufficient that the evidence on behalf of the defendant tended to show that deceased was guilty of negligence contributing directly to his injury, but before this court can declare as a matter of law that deceased was guilty of such negligence, the evidence must be substantially all one way, and not such that reasonable minds might differ with respect thereto. This case, we think, belongs to the latter class, and was properly submitted to the jury.

It is asserted that plaintiff's first instruction is erroneous, in that it bases her right of recovery upon the violation of an ordinance of the city, but as the right to maintain this action upon that ground was recognized by this court in its former opinion, and the question expressly ruled adverse to that contention in the recent cases of *Jackson v. Kansas City etc. R. R. Co.*, 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32, and *Hutchinson v. Missouri Pac. Ry. Co.*, 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852, it is unnecessary to say more upon that subject.

The question as to whether or not there was a violation of the ordinance relative to lights on the train was, under the evidence, a question for the consideration of the jury.

Plaintiff's second instruction is complained of upon the ~~206~~ grounds that it is too long, obscure, and confusing, and that there was no evidence on which to base the issue as to the adequacy of the bell when ringing to give notice of the approach of the train, submitted by this instruction. But this criticism is not justified by the instruction except as to its length, and this would hardly justify a reversal of the judgment upon that ground.

Another contention is that the court erred in refusing the second instruction asked by defendant, but the points presented by that instruction were fully covered by the fourth and tenth instructions which were given in behalf of defendant, and no further instructions upon the topics were necessary. A further contention is that error was committed in permitting

the witness Collins to testify as to the dazzling effect of the headlight on the west-bound cable train.

The same point was made when the case was here before, but was not passed upon, for the reason, we presume, that it was not regarded as reversible error. But whether we are correct in this view or not, the evidence was as to a fact—that is, the effect of “these particular cable lights at that time,” to which any witness having personal knowledge thereof might testify.

A point is made on the ruling of the court in permitting John E. Dwyer and James O’Brien who were witnesses for plaintiffs, to answer improper hypothetical questions in regard to the rate of speed the train was running at the time of the accident, the distance in which it could have been stopped, and other questions of like character. The objection was as follows: “Objected to by defendant’s counsel as not proper rebuttal, and as incompetent, immaterial, and irrelevant, and not a proper hypothetical question, and not a proper method by which to prove the rate of speed of the train.”

No principle of practice is better settled than that the order in which testimony shall be introduced in the trial of a ²⁰⁷ cause is almost entirely within the discretion of the court, and, even if not strictly in rebuttal, such an error would not ordinarily justify a reversal of the judgment upon that ground, and certainly it should not do so in this instance, because not prejudicial. No objection was made to the competency of these witnesses upon the ground that they were not qualified as experts. Nor that the facts hypothecated in the questions and answers were not in evidence, and hence these points must be considered as having been waived.

As to the contention that it is impossible for an expert to give any accurate idea of the rate of speed at which a particular train is moving, from the time or distance necessarily taken in stopping it, it has been held permissible to prove by experts within what time or distance a train running at a given rate of speed may be stopped: *Watson v. Minneapolis St. Ry. Co.*, 53 Minn. 551, 55 N. W. 742; *Eckert v. Railroad*, 13 Mo. App. 352. In any event, we are unable to conceive how defendant could have been prejudiced by such evidence under the circumstances.

A final contention is that the verdict was the result of passion and prejudice, but there is nothing disclosed by the record

to justify such contention. The appeal is from a second verdict for precisely the same amount as the first, which would seem to 'dispel any doubt as to its fairness, and leaves no ground for the assertion that it was the result of passion or prejudice.

The judgment should be affirmed, and it is so ordered.

Brace, Valliant, and Gantt, JJ., concur.

Sherwood, Robinson, and Marshall, JJ., dissent.

Railroad Crossing.—The duty of a traveler to look and listen before going upon a railroad track is absolute where the opportunity exists: *Guhl v. Whitcomb*, 100 Wis. 69, 83 Am. St. Rep. 889, 85 N. W. 142; *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380, 17 Am. St. Rep. 775, 18 Atl. 619. If, by looking, he could have seen an approaching train in time to escape, it will be presumed, in case he is injured, either that he did not look, or, if he did look, that he did not heed what he saw: *Pittsburgh etc. R. R. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576. However, knowledge by a person that trains are habitually run at a rate of speed in violation of law does not render him guilty of contributory negligence, merely because he does not act upon the assumption that the train by which he is injured would be so run: *Hasie v. Alabama etc. Ry. Co.*, 78 Miss. 413, 84 Am. St. Rep. 632, 28 South. 941. See, also, *Hutchinson v. Missouri Pac. Ry. Co.*, 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852. One approaching a crossing has a right to assume that the railway company acts with proper care, and that all reasonable and necessary signals of the approach of trains will be given: *Atchison etc. R. R. Co. v. Hague*, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257. See, also, *Hicks v. New York etc. R. R. Co.*, 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721. He may assume that the company will perform its statutory duty, and give warning of an approaching train by sounding the whistle: *Smith v. Boston etc. R. R.*, 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290. Where a person is killed at a crossing, the burden of showing that he knew of the approach of the train is upon the railroad company: *Nohrden v. Northeastern R. R. Co.*, 59 S. C. 87, 82 Am. St. Rep. 826, 37 S. E. 228. Compare *Pittsburgh etc. R. R. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576; and see *Wieland v. Delaware etc. Canal Co.*, 167 N. Y. 19, 82 Am. St. Rep. 707, and cross-reference note thereto, 60 N. E. 234.

FRANTA v. BOHEMIAN ROMAN CATHOLIC CENTRAL UNION.

[164 Mo. 304, 63 S. W. 1100.]

INSURANCE—RELIGIOUS BENEFIT SOCIETIES—CONSTITUTIONAL LAW.—Persons of any religious denomination may form a fraternal benefit insurance society, and by its laws limit its membership to persons of the same religious belief and suspend or expel a member for failure to observe a duty prescribed by the church and required by the law of the society. The requirement that the member must continue in good standing in the church to retain his membership in the society does not violate a constitutional guaranty that he shall have the right to worship according to the dictates of his own conscience. (p. 612.)

INSURANCE—RELIGIOUS BENEFIT SOCIETIES.—If persons of a particular religious faith prefer to be associated with those of that faith and desire to form a fraternal insurance benefit society composed alone of members who are in harmony with them on that subject, there is nothing in the law to forbid them, and a society so formed is in no sense a religious corporation, although its by-laws provide that to retain membership in the organization the member must have, and continue to have, good standing in the church and in the observance of its requirements. (p. 615.)

D. and J. Dillon, for the appellant.

Koehler, Reiss & Lesinsky and W. R. Schery, for the respondents.

308 VALLIANT, J. Plaintiffs are the minor children of Peter Franta, deceased, who in his lifetime had been a member of the defendant corporation, which is a fraternal beneficiary society, incorporated under the laws of this state, and the suit is to recover on a benefit certificate or quasi life insurance policy for one thousand dollars issued by the society to plaintiffs' father.

The answer of the defendant pleads that it is an association of persons who are members of the Roman Catholic church; that by its constitution no person can be a member who is not a Roman Catholic and who does not perform his duties as required by the church, and that one of those duties is to go to confession and receive the sacrament of the holy communion every year during Easter time, and the constitution and by-laws require every member to perform that duty and to produce to the society a certificate of the priest that he had done so, or failing therein the society has the authority to suspend him indefinitely, or for such time as it may

deem just, first giving him an opportunity to clear himself of the charge; that every applicant for membership in the association is required ³⁰⁹ to sign an agreement that he will be governed by its constitution and laws, and the plaintiffs' father signed such agreement and was admitted to membership thereupon; that plaintiffs' father did not receive the sacrament of the holy communion during Easter in 1896, and was charged in the society with that omission, and in a regular meeting he admitted the truth of the charge, and thereupon, in due course, the society suspended him from membership indefinitely, and he died while so suspended; that by the laws of the order a suspended member lost all benefits during his suspension.

The plaintiff demurred to that plea, and the court sustained the demurrer on the ground that the provision of the law of the defendant society was in violation of section 5, article 2 of the constitution, and defendant not pleading further, judgment for the plaintiffs was rendered for one thousand and sixty-nine dollars and sixteen cents, from which the defendant appeals.

The only question in the case is, whether persons of any religious denomination may form a corporation under our statutes in reference to fraternal beneficiary societies, and by its laws limit its membership to persons of the same religious belief, and suspend or expel a member for failure to observe a duty prescribed by the church and required by the law of the corporation.

The clause of our constitution which the circuit court adjudged to have been violated by the law of the defendant corporation is section 5 of the Bill of Rights, and is in these words: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no person can, on account of his religious opinions, be rendered ineligible to any office of trust or profit under this state, nor be disqualified from testifying, or from serving as a juror; that no human authority can control or interfere with the rights of conscience; that no person ought, by any ³¹⁰ law, to be molested in his person or estate on account of his religious persuasion or profession; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace, or safety of this state, or with the rights of others."

When we consider the purely voluntary character of the society in question, that no one can be brought into its membership but by his own free will, nor restrained to keep his membership when he wishes to withdraw, that he can be admitted only on terms and conditions upon which he and the society mutually agree, that he can be expelled or suspended only in conformity to laws of the society which he has agreed he would obey and submit to, and when we also consider that by expulsion or suspension he is deprived of no right or privilege which he holds independent of the society, which was not created by the society itself, and which in so far as it may have assumed the character of a right is purely contractual and depends for its continuance on the observance of the terms of the contract, it would be a strange construction of the clause of the constitution guaranteeing freedom of conscience if we should interpret it to mean that one under those circumstances was entitled to receive the fruits of his contract while declining, from scruples of conscience, to perform the conditions which entitle him to the same.

The defendant corporation is organized under article 10, chapter 42 of the Revised Statutes of 1889. Fraternal beneficiary corporations necessarily have the character of fraternal or social community; that is, their foundation, the pecuniary benefit or quasi insurance, that the law allows to be contracted for, is merely incidental to the social or fraternal character. The language of the statute specifying the purposes for which corporations under that article may be formed is: "For benevolent, religious, scientific, ³¹¹ fraternal, beneficial or educational purposes." Insurance is not one of the fundamental purposes for which a corporation under that article may be formed. When the purpose is to form a life insurance company on the assessment plan, the organization must be effected under another statute enacted for that purpose. Having prescribed the purposes for which such corporations may be formed and the procedure for their organization, the statute goes on to confer upon fraternal beneficiary associations the power to make provision by assessments to pay benefits to the families or dependents of deceased members, and to their sick or disabled members living, but it avoids the word "insurance" in that connection, and expressly exempts such societies from the operation of the insurance laws of the state. Benefit certificates issued by such societies have some of the characteristics of life insurance policies, and are enforced in

the courts according to the contract, but there is something more in the contract evidenced by such a certificate than there is in that evidenced by an ordinary life insurance policy.

These societies are sometimes referred to as organized for charitable purposes, but death losses on such benefit certificates are not to be classed under that head, for they are enforced according to the terms of the contract, and even sick benefits do not fill the legal meaning of the word "charity," because they are limited to the members of the society. An act to be charitable in a legal sense must be designed for "some public benefit open to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite, until they are selected or appointed to be the particular beneficiaries of the trust for the time being." "Money contributed by the members of a club to a common fund, to be applied to the relief and assistance of the particular members of the club when in sickness, want of employment, or other disability, is not ³¹² a charitable fund to be controlled by a court of equity": Perry on Trusts, sec. 710. It is not charity to give to your friend because of friendship, nor to your associate in a society because of your duty imposed by the laws of that society. Charity, in the legal sense, has been illustrated by reference to the custom of the ancient Jews, to leave at random a sheaf of corn here and there in the field for the poor gleaners who followed the harvesters, it being unknown who would get it. Therefore, there is nothing in the idea of a charitable trust to influence the decision in this case. If the plaintiffs are entitled to recover, it must be upon the theory that their father held a contractual relation with the defendant corporation at the time of his death which entitled him to membership therein and the benefits incident to such membership.

Fraternal beneficiary societies appear to have received the approbation and encouragement of the legislatures in many of the states, and have greatly increased in number and in the volume of their peculiar insurance within the last twenty years. Such has certainly been their history in Missouri. This encouragement has arisen from the fact that in their dealings with the families of their deceased members they have not been influenced alone by the strict letter of their contractual obligation, but also to a great extent by that spirit of fraternity which is the life of their organization. It not infrequently happens that the dues or assessments of an un-

fortunate sick member are paid by the members of his subordinate lodge or out of its treasury, to keep him in good standing, in the face of impending death, for the very purpose of securing the payment of the benefit fund to his family. Such is not the conduct of mere strangers with each other or of those who are bound only by the ties of a contract of insurance. And the law recognizes in that spirit of fraternity not only a guaranty of life insurance when the member dies, but also the development of better character ³¹³ among the members while living, and thus the state derives a moral benefit.

But the idea of fraternity on which these societies are founded is not that of the mere abstract principle, which includes all mankind; it is rather fraternity in the concrete, embracing only those who have some feature common to themselves but not universal, which renders them for that reason a separate and peculiar band of friends or associates, distinct from the rest of the world. Such a peculiar quality, common to them but distinguishing them from mankind in general, is absolutely essential to a fraternal society, and it alone distinguishes these societies in their conduct from life insurance companies on the assessment plan.

In the invitation that our statute gives to the people to form such societies, it does not specify what sentiments or bonds of union may be used for that purpose. Whatever sentiment a number of men may have in common and peculiar to themselves, which draws them together for a purpose that is not immoral or inimical to the state, may be made by them essential to admission to membership in their society, and it follows, as a corollary, it may be made essential to retention of such membership. If men of a particular religious faith prefer to be associated with those of that faith and desire to form a corporation composed alone of members who are in harmony with them on that subject, there is nothing in our law to forbid them. But a fraternal beneficiary society founded on and limited to such membership is in no sense a religious corporation. It is not formed to teach or propagate the religious faith, but to cultivate the spirit of fraternity among its members who are of that faith, and incidentally to provide a pecuniary benefit for them and their families as the statute contemplates. And if the corporation may lawfully prescribe, as a condition precedent to admission to membership, that the applicant be one who ³¹⁴ is a member in

good standing of a certain church and who conforms to its teachings, it may also prescribe as a condition subsequent to retaining his membership in the corporation that he continue in good standing in the church and in observance of its requirements. The corporation does not thereby become a propaganda of religious dogma, but only secures to its members that exclusive congenial association which it promised.

The Masonic fraternity is generally reputed to be a society having for one of its objects at least the practice of charity in, its broadest sense, yet a corporation known as the United Masonic Benefit Association, which was only a life insurance company on the assessment plan and in no sense a charitable society, had prescribed as a qualification for membership that the applicant be a Mason in good standing, and it was held that a by-law of the corporation declaring that upon a member thereof ceasing to be a member in good standing of the Masonic fraternity he, ipso facto, forfeited his membership in the corporation was valid: *Ellerbe v. Faust*, 119 Mo. 656, 25 S. W. 390. In that case the purpose of the corporation was life insurance, and it had nothing to do with teaching or propagating the tenets of Masonry, yet it was held that as it was a mutual society and those who had organized and composed it had seen fit to limit their association to Masons in good standing, no one not belonging to that class could come into it, or being in, no one ceasing to be of the class could remain in. The clause of the constitution invoked in the case at bar as much protects a man in refusing to be or to remain a Mason against his conscience, as it does in refusing to be or to remain a member of a particular church.

The law is not greatly concerned in guarding a man in that freedom of conscience which would permit him to enter into a contract and keep it to the extent that it suits him, and repudiate it otherwise. If the father of the respondents in this case acquired any rights which he or they could enforce against ³¹⁵ this corporation, it was by virtue of an express contract which prescribed the terms upon which he was admitted to membership, and as expressly prescribed the conditions necessary to be observed on his part to continue that membership, and the terms of continuing were exactly the same as the terms of admission. He expressly represented as a condition to his admission that he was a member of the Roman Catholic church, and that he observed its laws and would continue to do so while he remained a member of the

corporation, and that if he should cease to conform to the laws of the church in the particular mentioned in the answer, he expressly agreed that the corporation might suspend or expel him, and thereby exclude him from its benefits. Under the constitution and laws of this state a man cannot be coerced into observing the sacraments of any church, and even if he should enter into a solemn contract to do so, he is free to break the contract, and for breaking it he cannot be deprived of any right that he has independent of it. But if by the contract a special benefit is created for him, he cannot break the contract and have the benefit too. The court of appeals of Kentucky, passing on exactly the question we are now discussing, said: "But apart from this, we cannot see that appellee's rules are in any way inconsistent with the constitution of Kentucky. The plaintiff never acquired the right to be thus watched and cared for in sickness, and to have his family provided for after his death, except upon the condition that he perform certain religious duties required of members of the Roman Catholic church. Those duties were to be performed every year during his membership in order to keep alive the corresponding obligation of his fellow-members. This right was at most but a conditional one, and has never been 'diminished' by any act of the society. . . . To compel them (other members of the society) to watch and care for plaintiff in times of sickness and contribute to support of his family after death, when ³¹⁶ they have agreed to do this for those who remain true their church, would be to disregard and trample upon that mutuality which lies at the foundation of all contracts. . . . The religious liberty of every denomination in this land demands that no such principle as this be declared as the law of Kentucky": *Hitter v. St. Aloysius Soc.*, 4 Ky. Law Rep. 871. And to like effect, also, is *Matt v. Roman Catholic etc. Soc.*, 70 Iowa, 455, 30 N. W. 799. If any court of last resort has ever held to the contrary, our attention has not been drawn to the case.

The facts stated in the defendant's plea constituted a complete defense to the plaintiffs' cause of action, and the court erred in sustaining the demurrer. The judgment is reversed and the cause remanded to the circuit court to be proceeded with according to the law as herein expressed.

All concur.

Benefit Societies.—On features of the law especially applicable to mutual or membership insurance, see the monographic notes to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 543-579; *Strauss v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 706-720. On the remedies of members of fraternal and other associations, see the monographic note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 198-209. And on the jurisdiction of courts over voluntary unincorporated associations, see the monographic notes to *Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 160-170; *Kearns v. Howley*, 68 Am. St. Rep. 856-871.

STATE v. HENDERSON.

[164 Mo. 347, 64 S. W. 138.]

JUDGMENTS—APPEAL—SUPERSEDEAS.—An appeal by an executor without a bond from a personal judgment in the circuit court against him on final settlement of the estate does not operate as a supersedeas, and when the circuit court judgment is certified back to the probate court, the latter may order final distribution the same as if no appeal had been taken. (pp. 620, 622.)

EXECUTORS AND ADMINISTRATORS—FINAL SETTLEMENT—NOTICE OF ORDER OF DISTRIBUTION.—If final settlement of an estate has been adjudged showing a balance in the hands of the executor for distribution, the order therefor follows as a natural consequence, and the executor, in contemplation of law, is in court for that purpose until the order is made. He is not entitled to notice that such order is to be made, and it may be made in his absence, and the unfulfilled promise of the court to notify him when the order would be made does not affect its validity. (p. 624.)

JUDGMENTS—ENTRY OF.—A judgment is the act of the court and the final determination of the rights of the parties. Its entry in the record is the act of the clerk and merely ministerial, and while the judgment may be proven only by the record, yet it derives its force, not from its entry on the record, but from its rendition by the court. (p. 624.)

JUDGMENTS, TIME OF ENTRY OF.—The validity of a judgment properly rendered is not affected by the delay of the clerk in entering it in the court record. (p. 625.)

WRIT OF PROHIBITION—JURISDICTION.—In a proceeding in the supreme court by writ of prohibition to prevent the enforcement by a probate court of an order of distribution against an executor, the court can review only questions of the jurisdiction of the probate court, and it cannot consider questions of error in refusing to allow such executor credits and in charging him with certain items, or whether another writ of prohibition in another court is res judicata or not. (p. 625.)

M. Kinealy, T. J. Rowe, and Kinealy & Kinealy, for the relator.

J. P. Maginn and W. F. Woerner, for the respondents.

³⁵¹ VALLIANT, J. This is an original proceeding in which a writ of prohibition is sought against the probate court of the city of St. Louis to prevent the enforcement of an order of distribution against the relator as executor of the will of Patrick J. Burke, deceased.

The petition states that Patrick J. Burke died in St. Louis, leaving a will disposing of real and personal estate, in which the relator was named as executor; that the will was duly probated and relator qualified as executor in the probate court of St. Louis; that at the September term, 1899, relator, having previously given the notice required by law, presented his final settlement as executor, in reference to which the court, on the last day of the term, made an order continuing the ³⁵² matter until next term, and thereupon adjourned until court in course; that in the vacation of the court immediately following, the clerk, without any authority therefor and without relator's knowledge, entered upon the records of the court what in form was a final judgment, approving the final settlement and a finding that the executor had in his hands three thousand five hundred and thirty dollars and eighty-five cents in cash and certain stocks, etc.; that afterward, December 1, 1899, certain papers were filed in the circuit court which were in form an appeal by one of the legatees in the will from that supposed judgment, and which being duly docketed came on for trial in the circuit court, which trial resulted in a finding and judgment that the executor had in his hands belonging to the estate six thousand five hundred and ten dollars and eighty-two cents in cash, besides the stocks, etc.; that relator filed his motion for a new trial, which was overruled, and took an appeal to this court, where the cause is now pending; that no transcript of the record or proceedings of the circuit court was certified to the probate court; nevertheless, the last-named court on July 14th, the last day of its June term, 1900, without notice to relator, rendered a judgment against him directing a distribution of five thousand dollars among the legatees under the will; that this judgment was not entered on the records by the clerk until the fifth day of September, which was during the following September term; that relator knew nothing of the judgment until the beginning of the September term, when his attention was drawn to it by a notification to his attorney that a motion for execution would be made in behalf of one of the distributees; that was before the judgment had in fact been entered

by the clerk; that upon this information relator appeared before the probate court at the opening of the September term, and presented his petition to set aside the order of distribution upon the ground that the court was without jurisdiction, the proceedings in the circuit court not having been certified to the probate court, and relator having had no ³⁵³ notice of the motion for an order of distribution and the order was unjust in that it did not give relator credit for certain amounts that he was entitled to, but the court denied relator's petition, and proceedings to enforce the order of distribution are now impending.

The petition then goes on to state that the relator next applied to the circuit court by petition for a writ of prohibition in like terms as are herein set out, whereupon a rule to show cause having been made, the judge and clerk of the probate court made their return and a trial was had in the circuit court, upon the conclusion of which relator asked an instruction to the effect that he was entitled to a writ of prohibition as prayed, which the court refused, and thereupon relator took a nonsuit with leave, and filed a motion to set the same aside, which the court overruled; that then relator presented a like petition to the St. Louis court of appeals, which that court refused to entertain, upon the ground that it had no jurisdiction because the judge of the probate court was a state officer; then the relator filed this petition in this court.

Respondents in their return deny that the probate court, at the September term, 1899, continued the matter of the final settlement, and aver, on the contrary, that at that term the relator presented his final settlement as stated, which was examined and considered by the court and approved, and the final judgment rendered, which was, after the adjournment of the court, entered on the records in due form by the clerk; that when relator took his appeal from the judgment of the circuit court he gave no appeal bond, and therefore that judgment was not superseded; they aver that a copy of the judgment of the circuit court was duly certified to the probate court, and the probate court was lawfully possessed of the case, when it made the order of distribution; deny that relator had no notice ³⁵⁴ of the application for the order of distribution, and aver that he was present in the probate court by his attorney on the day the motion was heard, and resisted the same upon all the grounds he now urges; that the legatees were present by their attorneys and the cause was heard

in due form by the court on July 7, 1900, and taken under advisement until July 14th, when the judgment was rendered by the court and a memorandum thereof given by the court to the clerk to be entered in the record, and the same was duly entered in the records of the court after its adjournment for the term; they deny the averments of the petition in relation to certain credits which relator claims are due him; aver that relator is insolvent and has given no bond as executor and has maladministered the estate, and they plead the proceedings in the prohibition case in the circuit court as *res adjudicata* of the matter now complained of.

The testimony shows that the executor presented his final settlement to the probate court on the last day of the September term, 1899; that the court examined it, approved it, and passed it as a final settlement, and so informed the executor's attorney, but the attorney misunderstood the court's meaning of the word "passed," and supposed the matter was continued until the next term, but the judge used the word in the sense that the final settlement was approved and allowed, and he made a memorandum to that effect and it was so entered as the judgment of the court. No one of the beneficiaries of the will were present when the final settlement was presented, and hence no exceptions to it were filed, but within ten days they took an appeal to the circuit court and exceptions were there filed and a trial in due form was had, in which both sides took part. At that trial the court disallowed a credit that the probate court had allowed, and charged the executor with interest on the funds, which swelled the amount found against him by the probate court, three thousand five hundred and thirty dollars and eighty-three cents, to six thousand five hundred and ten dollars and eighty-two cents, for which ³⁵⁵ final judgment in the circuit court was rendered, and from which judgment the executor appealed, but gave no bond. The circuit court ordered that a copy of its judgment be certified to the probate court, and that was done in due form by the clerk under the seal of the court, and that certified transcript of that judgment was on file in the probate court when the order of distribution was made. After the judgment of the circuit court had been rendered and a certified copy filed in the probate court, a creditor had notified the executor that on a certain day he would apply to the court for an order on him to pay his allowed claim, and in that connection the attorney for one of the legatees

wrote a note to the executor's attorney notifying him that on the same day the creditor applied for his order a motion for distribution of the estate would be made. That note was received by the attorney of the executor from three to eight days before the motion came up for hearing in the probate court, and it was the only notice the executor had of the proposed motion. But when the motion came up, which was July 7, 1900, the executor's attorney was there and resisted it "on the ground that a proper notice of the application, required by section 269 of the Revised Statutes of 1889 had not been given; that the motion should be in writing, when it was oral, and that the probate court had no jurisdiction to entertain the motion for the distribution because no transcript of the record and proceedings, etc., accompanied by the original papers required in section 286 of the Revised Statutes of 1889 had been sent to the probate court." After hearing the arguments the court took the matter under advisement; the attorney for the executor requested the judge to notify him if he should conclude to make an order of distribution, and the judge said he would do so, but afterward, on July 14th, the last day of the term, the court, without notifying the executor's attorney, made the order of distribution now ³⁵⁶complained of, and the executor's attorney did not know that it had been done until a few days before the beginning of the September term, 1900, when he was notified that an order for an execution for one of the distributive shares would be applied for. Up to that time the order of distribution had not been entered on the records of the court, although a full written memorandum thereof was given to the clerk for that purpose by the judge on the day the order was made. The order was not entered by the clerk on the records until after the beginning of the September term, 1900, and after the motion by the executor to vacate the order.

The theory of the relator is that the probate court had no jurisdiction to make the order of distribution because: 1. There had been no judgment of the probate court on the final settlement from which an appeal to the circuit court could be taken; 2. The record and proceedings of the circuit court had not been certified back to the probate court; 3. The executor was not duly notified of the application for an order of distribution; 4. The order was not entered on the records by the clerk until after the beginning of the next term, and the

judge had failed to notify the executor's attorney of his conclusion as he had promised to do.

The first ground of objection to the jurisdiction seems to rest on a misunderstanding by the executor's attorney as to what occurred in the probate court when the final settlement was presented. The court used the word "passed" in reference to the matter, and the counsel interpreted that to mean continued to the next term. But what the court in fact did was to examine, approve, and allow the account as presented and adjudge the balance as therein shown to be the amount due the estate on final settlement, and made a memorandum thereof from which the judgment in due form was entered of record. When this final settlement was presented to and considered ³⁵⁷ by the court, no one interested in the estate except the executor was present or represented; hence, there was no controversy and it was allowed as presented. But the fact coming to the notice of the legatees, an appeal was taken by one of them in due form, and a transcript of the judgment appealed from, with the necessary original papers, was lodged in the circuit court. Unquestionably the circuit court, on the face of the record, had jurisdiction of the case. When the trial came on all parties were represented and after a full hearing the circuit court rendered its judgment, showing a balance of over six thousand dollars against the executor, and from that judgment the executor appealed to the supreme court, but gave no bond, and it being a judgment against him in person, the appeal did not operate as a supersedeas. We see no merit in this first point, and indeed we do not understand the counsel to seriously now insist on it.

It is, however, contended that the circuit clerk had not certified a transcript of the record and proceedings back to the probate court, and hence the court had not become repossessed of the case after the appeal to the circuit court, and, therefore, had no jurisdiction of it. When an appeal is taken from a judgment or order of the probate court the statute requires the clerk to send up "a certified transcript of the record and proceedings relating to the case, together with the original papers in his office relating thereto." And after a trial de novo in the circuit court the clerk of that court "shall certify a transcript of the record and proceedings and the original papers" back to the probate court. In the case at bar the circuit clerk sent a certified copy of the judgment of the circuit court in the matter, together with the original

probate court papers, back to that court, and in the judgment was contained an order directing the clerk to so certify it. We do not see what more literal or substantial compliance with the ³⁵⁸ statute could have been adopted. The object of the transcript was to inform the probate court what disposition the circuit court had made of the case, and that was shown by the copy of its final judgment in the matter, and if anything was needed to indicate to the probate court that the circuit court was done with the case, that was shown by the order of the circuit court directing the clerk to certify the record back. That was in the nature of an order remanding the case.

The relator lays much stress on the point that he was not notified that an application for an order of distribution would be made. In point of fact, he was notified through his attorney, and was present by his attorney in pursuance of such notice, but he did not get the notice to which his counsel think he was entitled—that is, the notice required by section 243 of the Revised Statutes of 1899, which is as follows: "Each person entitled to distribution or partition, not applying therefor, shall be notified, in writing, of such application ten days before any such order shall be made." It is very plain from its language that that statute has no reference to a notice to be given to an executor; it applies only to persons entitled to a share in the distribution.

There is no statute prescribing a notice to be given to an executor or administrator in such case. When a final settlement has been adjudged, showing a balance in the hands of the executor for distribution, the order of distribution follows as a natural consequence: *Branson v. Branson*, 102 Mo. 613, 618, 15 S. W. 74. When a balance is thus found to be in his hands for distribution, the executor, in contemplation of law, is in court for that purpose until the order is made. Of course, the court would not suffer an unfair advantage to be taken of his accidental absence, but the law prescribes no notice for him, and the order may be made in his absence if the court sees fit to do so. But there is no ground for complaint of that kind in ³⁵⁹ this case, because this executor was notified and was present and urged all the reasons why the order should not be made that he now urges against its validity.

When the motion was heard and taken under advisement the judge, at the request of the executor's attorney, promised to notify him if he should conclude to make the order, but after-

ward made it on the last day of the term—July 14, 1900—and forgot to notify the counsel as promised, and in consequence the counsel did not know the order had been made until about the first of September, when he was notified that a motion for execution would be presented. It is unfortunate for the relator if he has suffered a disadvantage by the omission of the judge to give him the promised notice, but that fact does not affect the validity of the judgment, certainly not the jurisdiction of the court. It would be an exceedingly dangerous practice to allow judgments of record to be upset for such reasons: *Jones v. Hart*, 60 Mo. 351.

The last point advanced is that the judgment, though rendered July 14th, the last day of the June term, was not actually written in the records by the clerk until after the beginning of the September term. It was not entered as of the proceedings of the September term, but as of the proceedings of the June term. It was not a *nunc pro tunc* entry, but was simply a judgment which the clerk delayed entering, but when entered, appeared in its proper place in the court records, and as of the day of its rendition. There is nothing in that fact to render the judgment invalid: *Gibbs v. Southern*, 116 Mo. 204, 22 S. W. 713. "A judgment is the final determination of the right of the parties to the action": *Rev. Stats. 1899, sec. 766*. A judgment is the act of the court; its entry in the record is the act of the clerk; the one is judicial, the other is ministerial; the one is the determining act, the other is the evidence of it. A judgment of a court of record can be proven only by the record, yet ³⁰⁰ it derives its force, not from its entry on the record, but from its rendition by the court.

This subject is well considered in 18 *Encyclopedia of Pleading and Practice*, from which we make the following quotations: "The act, after the trial and final submission of a case, of pronouncing judgment in language which fully determines the rights of the parties to the action and leaves nothing more to be done except the entry of the judgment by the clerk, constitutes the rendition of a judgment": 18 *Ency. of Pl. & Pr.* 429. "The decisions of all courts must be preserved in writing in some record provided for that purpose. The reason for this does not lie in the fact that the entry is necessary to the completion of the judgment, for a judgment is as final when pronounced by the court as when entered and recorded by the clerk, and an entire failure to make up the record will not necessarily affect the parties interested": 18 *Ency. of Pl. & Pr.*

437, 438. "Since, as has been seen, the act of the clerk in entering a judgment upon a record is purely ministerial, a judgment properly rendered may be entered by the clerk in vacation": 18 Ency. of Pl. & Pr. 446. In the case at bar, the validity of the judgment was not affected by the delay of the clerk in entering it in the court record.

As to the alleged erroneous acts of the circuit court in refusing to allow the relator certain credits and charging him with other items, they cannot be inquired into in this proceeding; nor can we pass on the merits of respondents' plea of *res adjudicata*. Our attention is limited to questions affecting the jurisdiction of the probate court in the matter of the order of distribution complained of. We are of the opinion that the probate court has not exceeded its jurisdiction, and the writ of prohibition is therefore denied.

All concur.

A Judgment is the judicial act of the court; its entry is the ministerial act of the clerk. The decision of the court is the judgment; the entry by the clerk is the evidence of it: *Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Davis v. Shaver*, Phill. (N. C.) 19, 91 Am. Dec. 92. A judgment is rendered when ordered by the court: *Durant v. Comegys*, 2 Idaho, 809, 35 Am. St. Rep. 267. A judgment of divorce becomes effective at the time of its rendition, although it is not entered by the clerk until a subsequent date: *Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431. After being signed by the judge and filed with the clerk, it becomes binding upon the parties, although not entered: *Estate of Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887. Compare *Callanan v. Votruba*, 104 Iowa, 672, 65 Am. St. Rep. 538, 74 N. W. 13. The docketing of a judgment is not an essential condition of its efficacy, except for the purposes of a lien: *Bernhardt v. Brown*, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. 884.

A Writ of Prohibition lies to prohibit the exercise by an inferior tribunal or officer of judicial powers with which he is not vested, and to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful jurisdiction shall be exercised: *Speed v. Common Council*, 98 Mich. 360, 30 Am. St. Rep. 555, 67 N. W. 406. It does not lie to prevent errors and irregularities if the matter adjudged is within the jurisdiction of the tribunal: *Bullard v. Thorpe*, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36. The unlawful assumption of jurisdiction is the criterion by which to determine whether prohibition is the proper remedy: See the monographic note to *State v. Commissioners of Roads*, 12 Am. Dec. 607.

PARKEY v. VEATCH.

[164 Mo. 375, 64 S. W. 114.]

EXECUTION SALES—MORTGAGED PREMISES—PURCHASE OF EQUITY IN PART.—The purchaser at an execution sale of the equity of redemption in one of two mortgaged tracts of land cannot buy in the mortgage and enforce it against the remaining tract, and where he attempts to do so by foreclosure of the mortgage against both tracts, the mortgagor retaining the equity of redemption in the unsold tract may proceed in equity to prevent such foreclosure upon tendering the pro rata share of the debt resting upon such unsold tract. (p. 631.)

J. M. Winters and P. S. Rader, for the appellant.

A. W. Mullins and D. M. Wilson, for the respondent.

³⁷⁹ **BRACE**, P. J. The plaintiff, James Parkey, and his wife, Sarah S. Parkey, were the owners of three hundred and twenty acres of land in Sullivan county; that is to say, Sarah S. Parkey was the owner in fee of the southwest quarter of the northwest quarter of section 15, containing forty acres. James Parkey and Sarah S. Parkey were the owners in fee, as tenants in common, ³⁸⁰ of the northeast quarter and the northeast quarter of the northwest quarter of section 16, containing two hundred acres, and James Parkey was the owner in fee of the northwest quarter of the northwest quarter and the southeast quarter of the northwest quarter of section 16, containing eighty acres, all in township 62, range 19.

On the 4th of June, 1891, by their deed of that date duly executed, acknowledged, and recorded, they conveyed all of said real estate to Frank Madden in trust to secure the payment of their fifteen promissory notes of that date to the Omaha Loan & Trust Company, one principal note for three thousand dollars, payable seven years after date, and fourteen coupon interest notes each for eighty-eight dollars and fifty cents, payable semi-annually after that date.

Afterward, on the same day, the said James and Sarah S. Parkey, by a second deed of trust of that date, duly executed, acknowledged, and recorded, conveyed all of said real estate to said Madden in trust to secure the payment of their three other promissory notes of that date, payable to the said Omaha Loan & Trust Company, each for the sum of one hundred and forty dollars, in one, two, and three years from date, with ten per cent interest.

Afterward, on the fifteenth day of October, 1891, the said James and Sarah S. Parkey, by a third deed of trust of that date duly executed, acknowledged, and recorded, conveyed all of said real estate to John M. Winters in trust, to secure the payment of their promissory note of that date for three hundred and thirty-four dollars and eighty-five cents to N. J. Winters, payable ninety days after date, with eight per cent interest.

Afterward, on the 19th of November, 1891, the defendant Veatch obtained judgment in the circuit court of Sullivan county against the said Parkey for the sum of three hundred dollars and seventy cents, on which execution was issued, and all the interest of the said James Parkey in the said two hundred acre tract was sold to the said Veatch, who received a sheriff's deed therefor, dated ³⁸¹ May 27, 1892. Afterward, on the 19th of November, 1894, the said Veatch obtained a judgment in said circuit court against the said James and Sarah S. Parkey for the possession of said two hundred acre tract, by virtue of which he took, and ever since has remained in, possession thereof.

Afterward, on the 8th of January, 1895, the said defendant purchased the said Winters note for three hundred and thirty-four dollars and eighty-five cents. The same was duly assigned to him, and remaining due and unpaid, he caused the whole of the three hundred and twenty acres of land, conveyed by the said third deed of trust, to secure the same, to be advertised for sale on the 12th of March, 1895, in pursuance of the power therein contained. On the 4th of March, 1895, the plaintiff, by two deeds of that date, acquired the interest of his wife in the southwest quarter of the northwest quarter of section 15, and thus became the owner of one hundred and twenty acres of the three hundred and twenty acres, subject to the encumbrances, all of which was of about the same value per acre, and on the 8th of March, 1895, he tendered to the defendant three-eighths of the total amount due on said note and deed of trust for principal, interest, and costs, which tender the defendant refused to accept, and the plaintiff brought this suit in equity, in the circuit court of Sullivan county on the 11th of March, 1895, his petition herein being as follows:

"Plaintiff states that on the fifteenth day of October, 1891, he and his wife, Sarah S. Parkey, made, executed, and delivered to N. J. Winters their promissory note, secured by their certain deed of trust on the following described three hundred

and twenty acres of land, viz.: The southwest fourth of the northwest quarter of section 15, and the northeast quarter and the east half of the northwest quarter, and the northwest fourth of the northwest quarter of section 16; all in township 62, of range 19.

"That afterward, to wit, on the nineteenth day of November, 1891, the defendant recovered judgment against the plaintiff ³⁸² in the Sullivan circuit court for the sum of two hundred and seventy-six dollars and seventy-four cents, debt and cost of suit; that said defendant afterward caused an execution to issue out of said court on said judgment directed to the sheriff of said county, and that said sheriff afterward, by virtue of said execution, in the manner prescribed by law, levied upon, advertised, and sold two hundred acres of said land described as follows, to wit, the northeast quarter, and the northeast fourth of the northwest quarter of section 16, in township 62 of range 19, and at said sale said Veatch, the defendant, became the purchaser of said two hundred acres and received a sheriff's deed therefor.

"That afterward, to wit, at the May term, 1894, of this court, the defendant commenced a suit in this court in ejectment for the recovery of said two hundred acres of land as well as the canceling of certain deeds, and at the November term, 1894, of said court, the defendant recovered judgment as prayed, and ever since said time has been in the possession, and is now the owner and in possession, of said two hundred acres of land.

"That afterward, to wit, on the — day of February, 1895, the defendant became the purchaser and assignee of said note and deed of trust, and that he has advertised, or caused to be advertised, for sale the said three hundred and twenty acres of land as described in said deed of trust, and that on the twelfth day of March, 1895, the defendant intends to and will sell the said one hundred and twenty acres of said land, of which the plaintiff is the owner, under the alleged provisions of said deed of trust. Plaintiff further states that on the fifth day of March, 1895, he tendered to said defendant the sum of one hundred and thirty dollars and forty cents, being the amount of the debt then due and secured by the said one hundred and twenty acres aforesaid, and being the one hundred and twenty three hundred and twentieths of the entire debt then due and secured by the said deed of trust, together with six dollars, all

the costs accrued by reason of advertising said land, but that the defendant refused to accept the sum so tendered.

³⁸³ "Plaintiff states that all of said land is of practically the same value acre for acre, and that the one hundred and twenty acres of land included in said deed of trust is worth one hundred and twenty three hundred and twentieths of the whole three hundred and twenty acres, and no more. That at the time of the tender of the said money the amount tendered was one hundred and twenty three hundred and twentieths of the whole amount due on said note and secured by the said deed of trust on the whole three hundred and twenty acres.

"Plaintiff therefore tenders and brings into court the amount by him heretofore tendered to defendant, and prays the court that the said deed of trust be canceled, and that said note be canceled, and both satisfied in full, and if the defendant proceeds and sells the said one hundred and twenty acres, that the plaintiff be permitted to redeem the said land upon the payment to the defendant of the said sum of one hundred and thirty dollars and forty cents, or, if in the opinion of the court the amount be not sufficient, then upon the payment of such sum as the court may deem just and proper, which said amount the defendant is ready and willing to pay into court, and for all other and proper relief."

Afterward, on the twelfth day of March, 1895, the three hundred and twenty acres were sold by the trustee in pursuance of the advertisement, and the defendant became the purchaser thereof for the sum of fifty dollars, and received the trustee's deed therefor. Afterward, on the twentieth day of May, 1895, the defendant filed his demurrer in the circuit court to the petition of the plaintiff, on the ground that it stated no cause of action against the defendant, which, coming on to be heard on the 26th of June, 1895, was sustained by the court and final judgment entered thereon, from which defendant in due course prosecuted his appeal to the Kansas City court of appeals, where, on the fourteenth day of December, 1896, the judgment of the circuit court was reversed, and the cause remanded for further proceedings in accordance with the opinion rendered: 68 Mo. App. 67. Pending those proceedings, the ³⁸⁴ plaintiff brought suit in the Sullivan circuit court against the defendant for the balance due on the Winters note, and on the 26th of November, 1895, obtained judgment against him thereon for the sum of four hundred and fourteen dollars and thirty-five cents, paid off the balance due on the second deed of trust

to the Omaha Loan & Trust Company, amounting to the sum of three hundred and fifteen dollars, and also paid coupon interest notes secured by the first deed of trust, to said company, amounting to the sum of seven hundred and twenty dollars, and in addition thereto paid taxes on said lands amounting to the sum of two hundred and forty dollars.

The mandate of the court of appeals was filed in the Sullivan circuit court on the 27th of December, 1896, and the defendant then being in possession of the whole of the three hundred and twenty acres, as he ever since has been, at the May term, 1897, of said court filed his answer to plaintiff's petition, in which, after setting out at great length the facts and occurrences prior and subsequent to the institution of the suit, with legal conclusions predicated thereon, prayed that plaintiff's petition be dismissed, that he be enjoined from asserting any right or title in or to said land, that he be divested of any legal or equitable title he may have thereto or therein, and that the same be vested in the defendant, and for general relief. On the twentieth day of May, 1897, the plaintiff joined issue, by reply, and on his application the venue was changed to the Livingston circuit court, where on the 27th of September, 1897, the case was tried, and thereafter a decree entered which, after a long finding of facts, is as follows: "The court, therefore, feeling itself bound by the ruling of the Kansas City court of appeals, rendered on an appeal from the judgment of the Sullivan circuit court herein sustaining a demurrer to the plaintiff's petition, finds, as a matter of law, that when the defendant Veatch purchased the Winters note aforesaid, such purchase operated as a merger of title in defendant Veatch as to the two hundred acres of land, and further ³⁸⁵ operated as an extinguishment pro tanto of the Winters note due from the said Parkeys to the defendant Veatch. It is therefore ordered, adjudged, and decreed by the court here that plaintiff's petition be sustained; that the note originally given by James and Sarah S. Parkey to N. J. Winters, and by the latter assigned to defendant Veatch, together with the deed of trust given to John M. Winters, trustee, to secure the payment of said note, be each canceled and set aside, and for naught held in law or equity. That the prayer of defendant's cross-bill for affirmative relief be dismissed, and that the plaintiff have and recover of and from the defendant his costs in this behalf taxed at the sum of ——— dollars, and that he have execution

therefor." From this decree, the defendant in due course prosecuted his appeal to this court.

The case as presented to the court of appeals on the former appeal has been simply elaborated, but not materially changed by the mass of matter brought into the record on the trial on the merits—and the crucial question to be determined on this is the same as it was on that appeal.

The case when in that court was carefully considered, as is evidenced by the two unanimous opinions delivered by that court—one in the first instance, and one on motion for rehearing, both reaching the same conclusion, and in conformity with which is the decree of the circuit court, and in which it was held in substance, that the purchaser at execution sale of the equity of redemption in one of two mortgaged tracts of land cannot buy in the mortgage and enforce it against the remaining tract, and where he attempts to do so by foreclosure of the mortgage against both tracts, the mortgagor retaining the equity of redemption in the unsold tract may invoke the protection of a court of equity to prevent such foreclosure, upon ³⁸⁶ tendering the pro rata share of the debt resting upon the retained land. This ruling is consonant with equity, is well supported by the reasoning and the authorities cited in the opinions of the court of appeals, is in harmony with the principle of many other cases which we have had occasion to examine in connection with this, and the recent case of *Landau v. Cottrill*, 159 Mo. 308, 60 S. W. 64, some of which are cited in the second paragraph of the opinion in that case; and although we are of the opinion that the appeal in this case is within the jurisdiction of this court, and for that reason the case cannot be said to have been adjudicated by the decision of the court of appeals, yet its value as a true exposition of correct principles decisive of the case is in no way impaired by that fact, and we take pleasure in adopting the same for the decision of the case in this court. From which an affirmance of the decree would follow. But as it does not appear from the record that the plaintiff's tender was kept good by deposit, the affirmance will have to be conditional: *Landis v. Saxton*, 89 Mo. 375, 1 S. W. 359; *Hudson v. Glencoe Gravel Co.*, 140 Mo. 103, 62 Am. St. Rep. 722, 41 S. W. 450. The case will, therefore, be remanded to the circuit court, with directions that if deposit in that court has been made in accordance with the tender, or if not and such deposit shall be made within sixty days from the filing of the mandate herein, then the court will

enter up final decree as before, and if such deposit has not been, or shall not be, so made, then that plaintiff's bill will be dismissed. The costs of this appeal to be taxed against the appellant in any event.

All concur.

Execution Sales of mortgaged property and of the equity of redemption are considered in the monographic note to Atkins v. Sawyer, 11 Am. Dec. 193-198; King v. Cushman, 41 Ill. 31, 89 Am. Dec. 366; Powell v. Williams, 14 Ala. 476, 48 Am. Dec. 105; Collins v. State, 8 Ind. App. 542, 50 Am. St. Rep. 298, 30 N. E. 12; Second Nat. Bank v. Gilbert, 174 Ill. 485, 66 Am. St. Rep. 306, 51 N. E. 584; Mitchell v. Ringle, 151 Ind. 16, 68 Am. St. Rep. 212, 50 N. E. 30.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

*
STATE v. MEYER.

[65 N. J. L. 237, 47 Atl. 486.]

ABORTION—TWO OFFENSES.—TO THRUST AN INSTRUMENT into the womb of a pregnant woman, with intent to cause a miscarriage, in consequence whereof the woman dies, and the same offense when death does not result, constitute two distinct offenses under the New Jersey statutes. (pp. 634, 635.)

WHETHER ONE HAS BEEN CONVICTED OF MURDER IN THE FIRST OR SECOND DEGREE is, under the New Jersey laws, to be determined solely by the verdict, the indictment being simply for murder without setting forth the degree. (p. 635.)

ABORTION—DYING DECLARATION.—Where an instrument charges the death of a woman as the result of an abortion, her dying declarations are admissible in evidence. (p. 636.)

DYING DECLARATIONS ARE ADMISSIBLE IN EVIDENCE although the indictment does not specifically charge either murder or manslaughter. (p. 636.)

Nicholas C. J. English, prosecutor of the pleas, for the plaintiff in error.

Jeremiah A. Kiernan, for the defendant in error.

238 DIXON, J. The defendant was indicted for having, without lawful jurisdiction, thrust an instrument into the womb of A. K., a woman then pregnant with child, with intent to cause her miscarriage, in consequence whereof the woman died. On trial in the Union sessions, the dying declarations of A. K. were admitted in evidence on behalf of the state, against the defendant's objection, and the defendant was convicted. On error, the supreme court reversed the conviction

because of the admission of that evidence. The reason assigned by the supreme court for such reversal is that, as the legislature, in the crimes act of 1898 (Pamphlet Laws, p. 794, sec. 119), declared the act of the accused to be a high misdemeanor, whether the woman or child died in consequence thereof or not, the death of either is not now an essential element of the crime, but is merely a fact to be considered in fixing the penalty.

This reason, we think, is unsound. While it is true that the statute calls the prohibited conduct a high misdemeanor, whether the woman or child die in consequence thereof or not, yet on due attention to all its provisions, it clearly appears to describe two high misdemeanors—one where the woman or child dies in consequence of the operation, and the other where death does not ensue.

A noticeable feature of the crimes act of 1898 not found in our earlier criminal laws is that the section defining an offense merely designates it as a misdemeanor or a high misdemeanor without fixing the punishment for guilt, and then a separate section declares what punishment may be imposed on persons convicted of a misdemeanor, and what on persons convicted of a high misdemeanor. When a penalty different from those thus generally prescribed is intended, that is indicated in immediate connection with the definition of the crime.

In accordance with this design, the offense against pregnancy, when death does not result, is simply called a high misdemeanor, leaving the penalty to be ascertained from the section declaring the punishment appropriate to that degree of guilt; but for such offense, when death results, a severer penalty is provided by the section defining the crime, and, of course, the more aggravated offense is also called a high misdemeanor.

Except for the modification which this purpose of the revisers dictated, the language of the statute is substantially the same as before, and does not manifest, we think, any intention to blend what before were distinct offenses into one. It still remains true, as was ruled in *State v. Gedicke*, 43 N. J. L. 86, 92, that if the indictment does not allege the death of either woman or child, the offense charged is only the minor one, and that a sentence imposing the severer penalty on a person convicted under such an indictment would be erroneous in law.

This offense is not put by our statutes on the same footing in this regard as is the crime of murder. Whether a person

convicted of murder has been convicted of murder in the first degree or in the second degree is, under the statute, to be determined, not by the indictment, but only by the verdict. The indictment is to be simply for murder, without setting forth the distinctive characteristics of murder in the first degree; but the verdict is to declare the degree. If nothing be proved save what is alleged in the indictment, the guilt reaches only to the second degree; but if the proof goes beyond and establishes the requisite circumstances of aggravation, a conviction of guilt in the first degree is lawful. No doubt it is anomalous that an accused person may be convicted of guilt above that explicitly averred in the accusation, but it rests on the language of the statute (Pamphlet Laws 1898, p. 794, sec. 107), and is thoroughly settled.

No such provision, however, exists as to the crime we are now considering, and we deem it indubitable that, to warrant the severer sentence, the indictment must charge all the statutory constituents of the more aggravated crime. Its distinguishing feature—the death of the woman or child as a consequence of the attempted abortion—must therefore be alleged in the indictment, and thus made the subject of investigation and proof at the trial.

²⁴⁰ When the death of the woman is thus charged as an element of the offense, necessary to be proved in order to establish against the accused the graver crime, and subject him to the severer punishment, her dying declarations are legal evidence, according to the rule as laid down by this court in *Donnelly v. State*, 26 N. J. L. 601.

We are aware that the question whether dying declarations can be received when the indictment does not specifically charge either murder or manslaughter has been answered in the negative by some tribunals whose judgments are entitled to very great respect; but, after due consideration of those decisions, our views coincide with those expressed in *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815, by Chief Justice Elliott, whose discussion of the subject is so thorough as to preclude any attempt at further exposition.

Of course, under this decision, an accused person may be exposed to the danger of having the dying declarations of a woman put in evidence, when her death is charged as the consequence of an abortion, but is not fully proved to have resulted therefrom, and thus they may be used in the jury-room as evidence to convict him of abortion merely without result-

ing death. But such a danger is not peculiar to trials of this nature. It may always exist when evidence is legally received by the court for a purpose not ultimately accomplished. As, e. g., in cases where the declarations of one charged as a conspirator are admitted against all the defendants, and yet he is acquitted by the jury; or where one charged with manslaughter is convicted of assault and battery only, under the doctrine asserted in *State v. Thomas*, 64 N. J. L. 532, 45 Atl. 913. The danger thus incurred must be guarded against as far as possible by appropriate instructions from the court.

Our conclusion is that the evidence was properly received, that the judgment of the supreme court should be reversed, and the judgment of the sessions should be affirmed.

WHAT DECLARATIONS ARE ADMISSIBLE AS DYING DECLARATIONS, AND IN WHAT CASES.

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II. Grounds of Admissibility.

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1. In General.

2. Declaration Need not State Belief in Death.

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4. Expectation of Recovery.

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VIII. Time of Making Declarations.

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IX. Declarations as Part of Res Gestae.**X. Prosecutions in Which Declarations are Admissible.**

- a. Homicide.
 - 1. Death of Declarant Under Inquiry.
 - 2. Death of Other than Declarant.
- b. Abortion.
- c. Other Cases.

I. Definition.

Dying declarations are statements of material facts concerning the cause and circumstances of a homicide, made by the victim under the solemn belief of impending death: *People v. Olmstead*, 30 Mich. 431; *State v. Baldwin*, 79 Iowa, 714, 45 N. W. 297; *People v. Sanchez*, 24 Cal. 17; *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953; *Brown v. State*, 32 Miss. 433.

Or, as stated by the Illinois supreme court, they are "such as are made by the party, relating to the facts of the injury of which he afterward dies, under the fixed belief and moral conviction that his death is impending and certain to follow almost immediately, without opportunity for repentance, and in the absence of all hope of avoidance; when he has despaired of life and looks to death as inevitable and at hand": *Starkey v. People*, 17 Ill. 17; *Westbrook v. People*, 126 Ill. 82, 18 N. E. 304; *Scott v. People*, 63 Ill. 508. There is no doubt about the general definition; the only question arises in determining whether the facts of a particular case bring it within the definition.

II. Grounds of Admissibility.

Dying declarations are substitutes for sworn testimony: *People v. Olmstead*, 30 Mich. 431; and are admitted without the obligation or sanction of an oath of the party making them: *State v. Oliver*, 2 Houst. 585. They have, however, a sanction which the law regards as the equivalent of an oath. And this is the effect on the mind which is produced by the solemn belief of impending death. Under such circumstances, experience seems to teach that no one is inclined or likely to utter anything but the truth: *People v. Olmstead*, 30 Mich. 431; *State v. Oliver*, 2 Houst. 585. The solemn impression of immediate dissolution is deemed to lay upon a person as strong an obligation to speak the truth as is imposed by an oath in a court of justice: *Donnelly v. State*, 26 N. J. L. 601. At such a time every motive to falsehood is presumed to be silenced, while every motive to speak the truth is said to be in "lively exercise": *Walston v. Commonwealth*, 16 B. Mon. 15. The ground upon which dying declarations are admitted was, in *Starkey v. People*, 17 Ill. 17,

said to be: "That they are made in a condition so solemn and awful as to exclude the supposition that the party making them could have been influenced by malice, revenge, or any conceivable motive to misrepresent, and when every inducement, emotion, and motive is to speak the truth. In other words, in view of impending death and under the sanctions of a moral sense of certain and just retribution." To the same effect, see *Scott v. People*, 63 Ill. 508; *Nelson v. State*, 7 Humph. 542; *State v. Terrell*, 12 Rich. 321; *People v. Beverly*, 108 Mich. 509, 66 N. W. 379; *State v. Williams*, 67 N. C. 12; *Brown v. State*, 32 Miss. 433; *Walston v. Commonwealth*, 16 B. Mon. 15; *Wilkerson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990.

It is also said that dying declarations are admitted on the ground of necessity: *State v. Oliver*, 2 Houst. 585; *Starkey v. People*, 17 Ill. 17. The defendant cannot complain, since he has by his own act put it out of the power of his victim to appear in person to give his testimony: *State v. Oliver*, 2 Houst. 585. The necessity of the case sometimes requires such evidence in order to identify the prisoner and establish the circumstances connected with the killing: *Nelson v. State*, 7 Humph. 542. And while necessity is one reason for relaxing the rule in favor of admitting dying declarations, it is not necessary that such necessity actually exist in order to render them admissible. The admission of such declarations has now become an established rule of evidence, and such testimony may be received independent of any question as to the paucity or abundance of other testimony: *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *People v. Beverly*, 108 Mich. 509, 66 N. W. 379; *Luker v. Commonwealth (Ky.)*, 5 S. W. 354; *Payne v. State*, 61 Miss. 161; *State v. Saunders*, 14 Or. 300, 12 Pac. 441. Doubtless, the origin of the rule admitting dying declarations was the inability to prove the facts in any other way: *State v. Saunders*, 14 Or. 300, 12 Pac. 441. But at the present time it is nowhere deemed a valid objection to the admission of such evidence that the exigencies of the case do not require it: *People v. Beverly*, 108 Mich. 509, 66 N. W. 379.

III. Circumstances Attending the Making of the Declaration.

It is not necessary that a dying declaration should be made in the presence of the defendant in order to render it admissible in evidence: *Shenkenberger v. State*, 154 Ind. 630, 57 N. E. 519. Hence, it may be made when the defendant is absent: *State v. Brunetto*, 13 La. Ann. 45; *People v. Beverly*, 108 Mich. 509, 66 N. W. 372. The fact that it was made in the presence of the prosecuting attorney, and that no one was present to represent the accused is wholly immaterial: *North v. People*, 139 Ill. 81, 28 N. E. 966. Dying declarations are admissible whether made to any officer or a private person: *State v. Daniel*, 31 La. Ann. 91; and although solely in the presence of the declarant's friends: *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537. Even suspicious circumstances connected with their

taking will not have the effect of excluding them, though such matters may affect their credibility: *People v. Knapp*, 26 Mich. 112. It is not necessary to their admission that notice of an intention to take them should be given the accused: *People v. Beverly*, 108 Mich. 509, 66 N. W. 379. They may be testified to in a foreign tongue and translated into English by a sworn interpreter: *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537.

IV. Competency of Declarant as Witness.

a. **Whose Declarations Admissible.**—The rule allowing dying declarations to be admitted in evidence is confined to the declarations of the person whose death is under investigation. Hence, the dying declarations of a witness to a homicide are held to be inadmissible: *Poteete v. State*, 9 Baxt. 261, 40 Am. Rep. 90. So also the dying declarations of an accomplice: *People v. Hall*, 94 Cal. 595, 30 Pac. 7. And the dying declaration of a third person who, it is alleged as a defense, committed the crime: *Mora v. People*, 19 Colo. 255, 35 Pac. 179. The dying declarations of a slave were held to be properly admitted in evidence, in *State v. Hannah*, 10 La. Ann. 131.

b. When Deceased is Competent.

1. **Generally.**—The general rules governing the competency of a witness to testify are applicable to dying declarations. Whatever will exclude the testimony of a witness, if living, will exclude his dying declaration: *Donnelly v. State*, 26 N. J. L. 463, 506; *State v. Williams*, 67 N. C. 12. The test to be applied is whether the deceased, if living, would have been permitted to testify to the things contained in the declaration: *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537. Hence, where a person convicted of burglary and larceny is incompetent to testify, by reason of infamy, his dying declarations are not admissible: *Walker v. State*, 39 Ark. 221. Also where he is too young to comprehend the nature of an oath, or is disqualified by reason of imbecility: *State v. Williams*, 67 N. C. 12. Where by statute the common law has been so changed that conviction of an infamous crime does not disqualify a living witness, it will not prevent the admission of his dying declaration, though such conviction may be shown to affect the credibility of the declaration: *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650.

2. **Mental Condition.**—A declarant must be sane and in his right mind in order to render his declarations admissible: *Commonwealth v. Silcox*, 161 Pa. St. 484, 29 Atl. 105. An imbecile's declarations are incompetent: *State v. Williams*, 67 N. C. 12. A person must be of sound mind and conscious when the declarations are made: *Benavides v. State*, 31 Tex. 579; *Cahn v. State*, 27 Tex. App. 709, 11 S. W. 723; *Testard v. State*, 26 Tex. App. 260, 9 S. W. 888. As was said in *Barnett v. People*, 54 Ill. 325, he must be free from mental aberration. Declarations wormed out of a wounded man

whose physical condition was so weak and low that he evidently answered wrongly were held inadmissible in *Mitchell v. State*, 71 Ga. 128. And where he is unable to answer, and merely nodded to answers made for him, and had to be aroused frequently from a stupor, while his statement was being read to him his declaration was held incompetent: *McHugh v. State*, 31 Ala. 317. See, also, *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953.

The fact that a declarant at the time he made his statements was somewhat under the influence of narcotics affects their credit but not their competency: *Hays v. Commonwealth*, 12 Ky. Law Rep. 611, 14 S. W. 833. Especially if there is evidence tending to show that the condition of the deceased was such as to render the declarations admissible: *People v. Beverly*, 108 Mich. 509, 66 N. W. 379.

3. **Effect of Relationship.**—Since a wife may be a witness in a criminal proceeding against her husband for injuries to herself, her dying declarations are admissible on his trial for her murder: *People v. Green*, 1 Denio, 614; *Pennsylvania v. Stoops*, Add. 381; *State v. Belcher*, 13 S. C. 459. The rule works both ways, so that the dying declarations of a husband are admissible against his wife to prove her guilt: *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276.

4. **Religious Belief.**—In most of our states, at the present time, belief in God or in a future state is not necessary to the competency of a witness. Hence, the dying declarations of a person may be admitted in evidence, though he is a disbeliever in God and in a future state: *State v. Elliott*, 45 Iowa, 486. No person is incompetent to be a witness on account of his opinions on matters of religious belief, and this rule applies to dying declarations: *People v. Sanford*, 43 Cal. 29; *People v. Chin Mook Sow*, 51 Cal. 597. Hence, it is not necessary that the declarant should be a believer in the Christian religion: *State v. Ah Lee*, 8 Or. 214. And it is of no consequence that he is a materialist. Proof of such fact cannot be shown to affect the admissibility of his dying declarations: *State v. Elliott*, 45 Iowa, 486. Neither are the tenets of the church to which the declarant belonged, that there may be repentance at any moment before death, a proper subject of inquiry on the question of their admissibility: *North v. People*, 139 Ill. 81, 28 N. E. 966.

At common law the question of religious belief was material. And if a declarant was wanting in religious sense of accountability to his Maker, his dying declarations were not admissible: *State v. Elliott*, 45 Iowa, 486; *People v. Sanford*, 43 Cal. 29. See the concurring opinion of Justice Crockett in this last case indicating why the rule that religious belief does not affect the competency of a living witness is not necessarily applicable to dying declarations. In *Donnelly v. State*, 26 N. J. L. 463, it was held in accordance with the common-law rule that dying declarations are not admissible in evidence if the person making them has no belief in God and in a future state of rewards and punishments.

A man's disbelief in God or in a future state may, however, affect the weight to be given to his dying declarations: *Nesbit v. State*, 43 Ga. 238. Hence, dying declarations may be discredited by showing that the deceased was a disbeliever in a future state of rewards and punishments: *Goodall v. State*, 1 Or. 333, 80 Am. Dec. 396; *Hill v. State*, 64 Miss. 431, 1 South. 494. For "when the deceased was a disbeliever, and consequently under no apprehension of future punishment for his falsehood, it is reasonable to believe that, however much he may be impressed with the fear of immediate and certain death, still he would not be under such strong influences to make a true statement of facts as one impressed with the belief of future accountability": *Goodall v. State*, 1 Or. 333, 80 Am. Dec. 396. It may therefore be shown that one was an atheist or a materialist to affect the credibility of his dying declarations: *State v. Elliott*, 45 Iowa, 486.

V. Form of Declaration.

a. **No Prescribed Form.**—To render a statement a dying declaration, no particular or set form of words is necessary to show that the declarant was under a belief of speedily impending death: *Winfrey v. State* (Tex.), 56 S. W. 919; *State v. Johnson*, 26 S. C. 152, 1 S. E. 510. It is no objection to the admission of a declaration that it took the form of a message to the declarant's wife: *Daughdrill v. State*, 113 Ala. 7, 21 South. 378.

As to whether it is necessary to state in the declaration itself that it is made under the solemn belief of impending death, see later under VII, b, 2.

b. **Oral Declarations.**—A dying declaration is not required to be in writing. It may be and frequently is oral. When the declaration does not appear to have been reduced to writing, no objection can be made to the introduction of oral statements: *Shenkenberger v. State*, 154 Ind. 630, 57 N. E. 519. If a dying declaration is reduced to writing, the writing is the best evidence of it, and should be introduced: *Dunn v. People*, 172 Ill. 582, 50 N. E. 137. Indeed, it would seem that oral statements made at the same time and not included in the writing are not admissible: *Adams v. State* (Tex.), 19 S. W. 907. But the mere fact that there are written dying declarations will not preclude the introduction in evidence of oral declarations made at other times: *Dunn v. People*, 172 Ill. 582, 50 N. E. 137; *Lane v. State*, 151 Ind. 511, 51 N. E. 1056. And this is true though the oral evidence is of the same declarations: *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49. Hence, where oral declarations are made, which are afterward committed to writing and assented to by the deceased as being correct, both declarations are admissible in evidence: *State v. Carrington*, 15 Utah, 480, 50 Pac. 526.

c. **Written Declarations.**—A dying declaration, if reduced to writing, may be admitted in evidence: *King v. State*, 91 Tenn. 617,

20 S. W. 169; *Dunn v. People*, 172 Ill. 582, 50 N. E. 187; *Perry v. State*, 102 Ga. 365, 30 S. E. 903; *People v. Brady*, 72 Cal. 490, 14 Pac. 202; *State v. Kindle*, 47 Ohio St. 358, 24 N. E. 485; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458. Under such circumstances the writing is the best evidence of the declarations: *Dunn v. People*, 172 Ill. 582, 50 N. E. 187; *King v. State*, 91 Tenn. 617, 20 S. W. 169. The writing itself is admissible in evidence: *King v. State*, 91 Tenn. 617, 20 S. W. 169; *Turner v. State*, 89 Tenn. 547; 15 S. W. 838; *Freeman v. State*, 112 Ga. 48, 37 S. E. 172; *People v. Brady*, 72 Cal. 490, 14 Pac. 202; *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650.

The writing is not used merely to refresh the memory of the witness: *Turner v. State*, 89 Tenn. 547, 15 S. W. 838. Especially is this true where the writing has been signed, as in the cases just cited. But even if not signed the writing itself is still admissible in evidence, if it is really a dying declaration, unless a statute requires it to be signed: *Freeman v. State*, 112 Ga. 48, 37 S. E. 172. Such a writing, taken down at the time the declaration is made, although not signed, is deemed to be more reliable and accurate than the memory of most men: *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49. So where the declarant was physically unable to sign, though conscious and mentally capable, this is no objection to the admissibility of the writing: *State v. Carrington*, 15 Utah, 480, 50 Pac. 526.

A declarant is not required to prepare his own written declarations. Indeed, it seems to be wholly immaterial who prepared them or when they are prepared, if the declarations were read over to him, he understood them and assented thereto: *Perry v. State*, 102 Ga. 365, 30 S. E. 903; *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49. So statements written by others as he makes them, which are subsequently approved and signed by him, are properly admitted as dying declarations: *People v. Brady*, 72 Cal. 490, 14 Pac. 202. They are admissible though the writing is not read over to him, if taken down at the time they are made, and the one who takes them testifies that the deceased made the statements written down, and that his mind was clear at the time: *Scales v. State*, 96 Ala. 69, 11 So. 121. But a mere private memorandum made of what a deceased said is not admissible in evidence, though it may be used to refresh the memory of the witness: *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257. And usually a declaration of a deceased taken down by another and not read over to him is not admissible as a dying declaration, and may be used only to refresh the witness' recollection: *State v. Fraunberg*, 40 Iowa, 555. See, further, to the effect that a dying declaration is admissible though reduced to writing by another, if it is approved by the deceased: *State v. Kindle*, 47 Ohio St. 358, 24 N. E. 485; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458. Such writing is admissible although when committed to writing it is not in the exact language used by the declarant, if it is subsequently

read to and approved by him: *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650.

A dying declaration may be written down, signed and sworn to: *People v. Brady*, 72 Cal. 490, 14 Pac. 202; *Commonwealth v. Haney*, 127 Mass. 455; *State v. Parham*, 48 La. Ann. 1309, 20 South. 727. And the fact that it was written by another than the declarant is immaterial: See the three cases just cited. A dying declaration is not inadmissible because made under oath: *State v. Talbert*, 41 S. C. 526, 19 S. E. 852. Though the fact that it is sworn to will not give it any additional force or weight: *State v. Frazier*, 1 Houst. C. C. 176. Hence an affidavit made by the deceased is admissible in evidence as a dying declaration, though the affidavit was not taken in accordance with the statute: *State v. Arnold*, 13 Ired. 184.

A deposition taken before a coroner has been admitted as a good dying declaration: *People v. Knapp*, 1 Edm. Sel. Cas. 177. A written deposition may be admitted though not signed by the declarant: *Pennsylvania v. Stoops*, Addis. 381. A deposition was held admissible in *State v. Ferguson*, 2 Hill (S. C.), 619, 27 Am. Dec. 412, when the deceased after the deposition had been read to him said "It was as nigh right as he could recollect the circumstances."

The fact that the scribe who reduced the declaration to writing appended to the statement, "In view of the probability of my dying, I make the above statement as my dying declaration," will not render it inadmissible, if it sufficiently appears that when the declaration was made the deceased believed he was about to die: *People v. Farmer*, 77 Cal. 1, 18 Pac. 800.

d. *Question and Answer.*—A dying declaration need not be a volunteered statement, and the fact that it was elicited by questions asked does not render it inadmissible: *State v. Ashworth*, 50 La. Ann. 94, 23 South. 270; *Anderson v. State*, 79 Ala. 5; *Ingram v. State*, 67 Ala. 67; *Commonwealth v. Haney*, 127 Mass. 455; *Richard v. State* (Fla.), 20 South. 413; *Grubb v. State* (Tex., May 22, 1901), 63 S. W. 314. The mere fact that certain of the dying declarations are made in response to questions asked does not deprive them of their voluntary and spontaneous character: *White v. State*, 30 Tex. App. 652, 18 S. W. 462; *Taylor v. State*, 38 Tex. Cr. Rep. 552, 43 S. W. 1019. The questions, however, must not be of such a character as to mislead: *Benavides v. State*, 31 Tex. 579. Neither should they be calculated to lead the declarant to make any particular statement: *Cahn v. State*, 27 Tex. App. 709, 11 S. W. 723; *White v. State*, 30 Tex. App. 652, 18 S. W. 462; *Taylor v. State*, 38 Tex. Cr. Rep. 552, 43 S. W. 1019. But the declaration may be in response to leading questions, and even to urgent solicitation: *Worthington v. State*, 92 Md. 222, 48 Atl. 355; *People v. Sanchez*, 24 Cal. 17; *Vass v. Commonwealth*, 3 Leigh, 786, 24 Am. Dec. 695. Though the fact that the declarant was urged to answer leading questions with earnest and pressing solicitation may impair the credibility of the

declaration: *People v. Sanchez*, 24 Cal. 17. In admitting a declaration made in response to questions asked, it is not material that the questions are omitted and the answers only given: *Richard v. State* (Fla.), 29 South. 413; *Commonwealth v. Haney*, 127 Mass. 455.

Dying declarations are not rendered incompetent because made in answer to questions asked by the wife or the physician of the deceased: *State v. Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293. Mere expressions or ejaculations, unconnected with any prior or subsequent statement, are inadmissible as dying declarations: *Luby v. Commonwealth*, 12 Bush, 1. Answers communicated by signs are good dying declarations, where the statement is subsequently read over to and signed by the deceased: *Jones v. State*, 71 Ind. 66. The statement, however, need not be read over to him and signed. The court even went so far in *Commonwealth v. Casey*, 11 Oush. 417, 59 Am. Dec. 150, as to hold that, if a person in a dying condition, and so injured as to be unable to speak, is asked to squeeze the hand of the questioner if the injury was inflicted by a named person, and thereupon does squeeze the hand, this is competent evidence to go to the jury, it being a good dying declaration. This case was recently cited with approval by the court of appeals of Maryland: *Worthington v. State*, 92 Md. 222, 48 Atl. 355. A mere nod of the head to questions and answers made by others is not a good dying declaration, if there is no evidence to show sufficient consciousness on the part of the deceased: *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953. In commenting on such a situation, the court, in *McHugh v. State*, 31 Ala. 317, very clearly states the rule thus: "It is clear that the language of the statement is not the language of the deceased; and that the declarations contained in it are not his declarations, unless made so by his mere 'nodding his head.' If there was anything to convince us that he perfectly understood the language employed in the statement, or that he was at the time able to have detected any erroneous inference as to his real meaning, which his friends might have expressed in the answers given by them and embodied in the statement, we should regard the assent given by the nodding of the head as sufficient. But we see nothing which satisfies us that he either perfectly understood the language, or was able to have detected the erroneous inference as to his meaning which his friends may have honestly drawn in making the answers set forth in the statement. He was just in that condition in which, for the sake of peace, or to be rid of the importunity or annoyance of those around him, the probability is, he would assent to, or seem to say, whatever they might choose to suggest. Such an assent, obtained under such circumstances, by the friends on whom he relied—not merely to a translation of language he himself had uttered to express his meaning, but to their inferences as to his meaning, couched in their own language, or in the language of the attorney who took down the state-

ment—cannot safely or legally be held sufficient to give to the statement thus assented to the force and effect of dying declarations, in a cause involving the life or liberty of a human being.”

e. **Partial or Distinct Statements.**—A dying declaration should generally be complete in itself to be admissible; that is, it should appear that the deceased said all he intended to say, for if it appears that he intended to connect it with other statements which he was prevented from making it will not be received: *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200. But he is not required to state everything constituting the *res gestae* of the subject of his statement: *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200. He need not give a complete narrative of all that occurred: *State v. Nettlebush*, 20 Iowa, 257. So where the declarant answered a question as to who shot him, the fact that he was too weak to answer another question will not render the first answer inadmissible: *McLean v. State*, 16 Ala. 672. The same is true where the deceased refused to answer further questions, saying that he was “a dying man”: *People v. Chin Mook Sow*, 51 Cal. 597. A dying declaration is admissible which states how the difficulty which resulted in the declarant’s death commenced, the narrative being continued by other witnesses on the trial where the deceased left off: *Brande v. State (Tex.)*, 45 S. W. 17.

A declaration need not be made all at one time, without interruption or turning aside to other matters: *State v. Ashworth*, 50 La. Ann. 94, 23 South. 270. Hence a declaration is admissible, though the declarant had to be aroused several times while making it, the statement which resulted being continuous, intelligent, and logical: *Taylor v. State*, 38 Tex. Cr. Rep. 552, 43 S. W. 1019. Facts stated distinctly as far as the deceased went are admissible, unless it is obvious that the party intended them to be connected with other facts about to be disclosed: *Vass v. Commonwealth*, 3 Leigh, 786, 24 Am. Dec. 695. A written statement which designedly omits certain declaration made by the deceased at the same time is inadmissible as a dying declaration: *Brown v. State*, 32 Miss. 433.

In introducing dying declarations the prosecution are not confined to declarations made at any one time if there were others made at other times, and all are competent: *People v. Simpson*, 48 Mich. 474, 12 N. W. 662. Hence if a deceased makes several dying declarations, all are admissible in evidence, if made under a sense of impending death: *Hines v. Commonwealth*, 90 Ky. 64, 13 S. W. 445; *Lane v. State*, 151 Ind. 511, 51 N. E. 1056. This is true though some of the statements may be in writing and others oral: *Lane v. State*, 151 Ind. 511, 51 N. E. 1056; *Dunn v. People*, 172 Ill. 582, 50 N. E. 137. Neither is it necessary to introduce all of the different declarations in evidence or any particular one: *Morrison v. State (Fla.)*, 28 South. 97. If a later statement is not made under a sense of impending death obviously it is not admissible in evidence: *State v. Sadler*, 51 La. Ann. 1397, 26 South. 390.

f. Ratification of Previous Declarations.—A deceased may make a dying declaration by ratifying statements which he has previously made. Hence where declarations are made by a wounded man before he is impressed with the belief that he will not recover the statements may be afterward called to his attention, and if understood and approved by him, may be a valid dying declaration if he is then under a belief that death was impending over him: *Brown v. State*, 32 Miss. 433; *Young v. Commonwealth*, 6 Bush, 312; *Mockabee v. Commonwealth*, 78 Ky. 380; *Carver v. United States*, 160 U. S. 553, 16 Sup. Ct. Rep. 388. The statements may have been originally made when the deceased fully expected that he would recover: *Mockabee v. Commonwealth*, 78 Ky. 380; or before he believed that the wound was likely to prove fatal: *Young v. Commonwealth*, 6 Bush. 312; or when he had a lingering hope of recovery: *Bryant v. State (Tex.)*, 33 S. W. 978. The fact that declarations are inadmissible at the time they are made is wholly immaterial, if they are subsequently reaffirmed under a sense of impending death: *State v. Evans*, 124 Mo. 397, 28 S. W. 8. It is the fact of ratification at a time when he believes that death is impending that renders the statement a dying declaration and admissible in evidence: See *State v. McEvoy*, 9 S. O. 208; *Bryant v. State (Tex.)*, 33 S. W. 978; *Million v. Commonwealth (Ky.)*, 25 S. W. 1059; *Wilson v. Commonwealth (Ky.)*, 60 S. W. 400. An identification of the prisoner by the deceased was admitted, in *State v. Kessler*, 15 Utah, 142, 62 Am. St. Rep. 911, 49 Pac. 293, though it referred to a former identification which was not admissible. Generally the statements made by a deceased are re-read to him at the time he ratifies them. But a re-reading is not a necessary prerequisite to the admissibility of such statements, if the decedent's condition is such that he recalls clearly the statements previously made, and, under a sense of impending death, reaffirms their correctness: *Johnson v. State*, 102 Ala. 1, 16 South. 99; *People v. Crews*, 102 Cal. 174, 36 Pac. 367; *Snell v. State*, 20 Tex. App. 236, 25 Am. St. Rep. 723, 15 S. W. 722.

VI. Character of Declarations.

a. Must be Connected with the Killing.—The statements of a deceased, in order to be admissible as dying declarations, must relate to the circumstances of the homicide: *Johnson v. State*, 47 Ala. 9; *Hackett v. People*, 54 Barb. 370; *Blalock v. State*, 40 Tex. Cr. Rep. 154, 49 S. W. 100; or the cause of the death: *State v. Garand*, 5 Or. 216. Or, as has otherwise been stated, they must relate to the act of killing or concern the circumstances immediately attending the acts occasioning the declarant's death and forming a part of the *res gestae*: *Walker v. State*, 52 Ala. 192; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233; *State v. Shelton*, 2 Jones, 360, 64 Am. Dec. 587; *Wilkerson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990;

State v. Draper, 65 Mo. 335, 27 Am. Rep. 287. A statement by the deceased, therefore, that he was helping the defendant, is competent evidence to show what the deceased was doing when he received the injury: State v. Jones, 89 Iowa, 182, 56 N. W. 427. Also statements that at the time defendant shot, the deceased did not see him and that the deceased was unarmed, are dying declarations: State v. Reed, 137 Mo. 125, 38 S. W. 574. Dying declarations are admissible to explain all the circumstances of the crime which led to the death of the declarant: People v. Knapp, 26 Mich. 112; Hurd v. People, 25 Mich. 405. If a part of a declaration is good, it may be admitted and the improper portion struck out: People v. Farmer, 77 Cal. 1, 18 Pac. 800.

A statement by a deceased of a distinct fact, in no way connected with the circumstances of the death, or the immediate cause of it, is not admissible as a dying declaration: Johnson v. State, 17 Ala. 618. And statements not referring directly to the crime may be excluded: State v. Wilson, 121 Mo. 434, 26 S. W. 357. Such portions of a dying declaration as relate to former and distinct transactions are not admissible in evidence: People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233; Lieber v. Commonwealth, 9 Bush, 11; State v. Draper, 65 Mo. 335, 27 Am. Rep. 287; Nelson v. State, 7 Humph. 542; State v. O'Shea, 60 Kan. 772, 57 Pac. 970.

Hence statements that at a former time the deceased carried a warrant for the defendant are inadmissible: North v. People, 139 Ill. 81, 28 N. E. 966. All the conversation between a decedent and another is not admissible as a dying declaration unless it is confined to the circumstances of the death or the immediate cause of it: Ex parte Barber, 16 Tex. App. 369; People v. Sweeney, 41 Hun, 332. A statement that the accused followed the deceased to his office was deemed incompetent as a dying declaration in Terrell v. Commonwealth, 13 Bush, 246. As was also the declaration, "I never carried anything to hurt anyone," in Collins v. Commonwealth, 12 Bush, 271.

Previous threats by the defendant against the deceased cannot be proved by dying declarations: Jones v. State, 71 Ind. 66; State v. Perigo, 80 Iowa, 37, 45 N. W. 399; State v. Wood, 53 Vt. 560; State v. Moody, 18 Wash. 165, 51 Pac. 356. Even threats made as recent as two weeks before the shooting are not the proper subject of a dying declaration: Merrill v. State, 58 Miss. 65. But in People v. Beverly, 108 Mich. 509, 66 N. W. 379, statements of threats in a dying declaration were held admissible, there being an obvious and intimate connection between the threats and the act. In this case the declarations showed that the accused repeatedly threatened to shoot his wife (the declarant) if she should leave him. The testimony showed that she did leave him, and not being able to induce her to return to him, that he shot her. The threats were deemed to be so closely connected with the circumstances of the homicide as to be admissible.

A statement that "It is pretty hard to go through the whole war and come home, and be murdered on my own farm," is not sufficiently connected with the circumstances of the killing as to be admissible as a dying declaration: *State v. Perigo*, 80 Iowa, 37, 45 N. W. 399. A statement by the deceased just before he died that he forgave the defendant is inadmissible: *State v. Evans*, 124 Mo. 397, 28 S. W. 8. As is also a request that the defendant be not prosecuted: *State v. Nelson*, 101 Mo. 464, 14 S. W. 712.

b. **Show Facts and not Opinions.**—A dying declaration must be the statement of a fact and not of an opinion: *Shenkenberger v. State*, 154 Ind. 630, 57 N. E. 519; *People v. Lanagan*, 81 Cal. 142, 22 Pac. 482; *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953; *Mathedy v. Commonwealth*, 14 Ky. Law Rep. 182, 19 S. W. 977; *State v. Chambers*, 87 Mo. 406; *State v. Lee*, 58 S. C. 335, 36 S. E. 706; *State v. Burnett*, 47 W. Va. 731, 35 S. E. 983. Declarations consisting of conclusions, opinions, and beliefs which would not be received if the declarant were a witness are not admissible: *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970. If a declaration consists in part of a statement of fact and in part an opinion, the former may be separated from the latter and admitted: *Lipscomb v. State*, 75 Miss. 559, 23 South. 210.

In *State v. Ashworth*, 50 La. Ann. 94, 23 South. 270, the court, in admitting dying declarations, said that the rules of evidence in such cases were not to be as rigorously applied when the declarations were in favor of the accused as when they are urged against him. And in *Handy v. Commonwealth*, 5 Crim. L. Mag. 47, it was held that the rule excluding opinions as dying declarations was subject to the exception that opinions of the deceased are admissible when favorable to the accused. This case was criticised and expressly disapproved by Whitfield, J., in *Lipscomb v. State*, 75 Miss. 559, 609, 23 South. 210, where he said: "Such a distinction seems to me untenable. I cannot see how the competency of a dying declaration, any more than the competency of any other testimony, is to be determined by whether it makes for or against the defendant."

There is a certain class of opinions which are more in the nature of statements of fact, and which are not deemed to be excluded on the ground that they are opinions. It is largely in cases of this character that any doubt exists as to whether a particular statement is of a fact or of an opinion. Such a case arises when, from all the circumstances surrounding the declarant at the time of the killing, it is reasonably probable that he had knowledge of what he states as a fact. In such a case his declaration is deemed the statement of a fact and not of an opinion, although in its last analysis it may be a real opinion. The distinction was clearly pointed out in *State v. Williams*, 67 N. C. 12: "Whenever the opinion of the witness upon such a question [identity of the accused here], or on

one coming under the same rule, is the direct result of observation through his senses, the evidence is admitted. As, for example, when a witness has seen a person or object at several times, and expresses his opinion as to the identity of what he saw at one time with what he saw at another, as human language is inadequate to convey to the mind of another person fully and accurately the impression made upon the mind of the witness through his sense of sight, his opinion, as the result of that impression, is admitted, and is entitled to more or less weight, according to the circumstances. And although opinions, as derived, may sometimes be erroneous, yet they are not generally so, and when carefully weighed are sufficiently reliable for practical use in the ordinary affairs of life. The witness does not unnecessarily substitute his judgment for that of the tribunal. But if the opinion of the witness is the result of a course of reasoning from collateral facts, it is inadmissible. As, for example, if at the time to which the question of identity applied he did not see or have the testimony of any sense as to the person in question, but believed it to have been him because he might have been there, and had a motive to have been there and to have done the act alleged. In such a case the tribunal is as competent to reason out the resultant opinion as the witness is; and by the theory of the law, it alone is competent to do so. To allow any influence to the opinion of the witness would be unnecessarily to substitute him to the function of the tribunal." In approving and applying this opinion, Judge Whitfield, in *Lipscomb v. State*, 75 Miss. 559, 607, 23 South. 210, said: "The mere form of a declaration is not conclusive as to whether it is the statement of a fact or of an opinion, for that is form, and not substance. But where the circumstances attending the declarant at the time the facts occur about which he speaks, to wit, the killing and its *res gestae*, are such as reasonably and probably demonstrated that he was speaking from knowledge, and not from opinion, such circumstances are of substantial value in showing that the statement is one of fact, and not one of opinion." This test would seem to be a valuable one in determining whether a dying declaration is the statement of a fact or of an opinion.

A statement by a deceased that he believed he was on his death-bed is not an opinion: *Doolin v. Commonwealth*, 16 Ky. Law Rep. 189, 27 S. W. 1. Where the deceased was killed while entering the defendant's store, his dying declaration that he had been sent to the store to make a purchase was admissible to show that he did not go there to renew a former difficulty: *Redmond v. Commonwealth*, 21 Ky. Law Rep. 331, 51 S. W. 565.

A statement that the defendant shot or killed the deceased is usually a statement of fact and a good dying declaration: *State v. Arnold*, 13 Ired. 184. If, however, the deceased did not see the defendant, a statement that it was he who shot him is a mere opinion:

State v. Williams, 67 N. C. 12. For in such a case it would be impossible for the deceased to have known the fact stated: *Jones v. State*, 52 Ark. 345, 12 S. W. 704. It must be clear, however, that the declarant could not have known the fact stated. So where the deceased was shot through an auger-hole in a door, a statement as to who shot him may be a good dying declaration as a statement of fact, where it was not too dark for him to have seen the defendant through the hole: *Walker v. State*, 39 Ark. 221. Also where the deceased did not at first recognize the defendant, but when the latter drew his pistol and "commenced his pranks," he knew that it was the defendant, this is a statement of a fact and not the mere expression of an opinion: *Brotherton v. People*, 75 N. Y. 159. A mere statement that he thought the defendant shot him is the expression of an opinion: *People v. Wasson*, 65 Cal. 538, 4 Pac. 555.

That the deceased had been butchered by the doctors was admitted as a statement of fact in *State v. Gile*, 8 Wash. 12, 35 Pac. 417. That a doctor poisoned him with a capsule he gave him that night was deemed a statement of fact in *Lipscomb v. State*, 75 Miss. 559, 23 South. 210, the court not being able to distinguish this from the declaration that a doctor had killed him, or shot him. That "The defendant shot me; ain't I right?" was held to be a statement of fact and not an opinion in *State v. Clemons*, 51 Iowa, 274, 1 N. W. 546. That "Dr. Maine [the defendant] operated on me," was held to be a statement of fact in *Maine v. People*, 9 Hun, 113. But a statement that "the operation was performed for the purpose of producing an abortion," was held to be an opinion, an inference from the facts, and hence not a good dying declaration: *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815. A declaration of the deceased that he believed the defendant was going after his pistol when he went into the house was held inadmissible in *State v. Vansant*, 80 Mo. 67. The opinion of a deceased as to the appearance of things, where it is the only evidence obtainable, is the subject of a good dying declaration, such as a statement of the appearance of things which go to make out a case of lying in wait for the deceased: *State v. Parker*, 96 Mo. 382, 9 S. W. 728. This would seem to be a case where the opinion was the direct result of observation through the senses. Where the accused gave the deceased a drink of wine out of a bottle, his declaration that he was thus poisoned by the accused is a mere opinion and inadmissible: *Mathedy v. Commonwealth*, 14 Ky. Law Rep. 182, 19 S. W. 977. Compare *Lipscomb v. State*, 75 Miss. 559, 23 South. 210, 230, already noticed. A statement by a deceased that he was poisoned by the defendant, which he knew because the defendant gave him a drink of whisky that tasted nasty, and because he shortly afterward took sick, is a mere opinion, and inadmissible as a dying declaration: *Berry v. State*, 63 Ark. 382, 38 S. W. 1038. A dying statement that he made the accused cut him is an opinion and inadmissible: *Sweat v. State*,

107 Ga. 712, 33 S. E. 422. A statement that the deceased treated them well, but they added insult after insult, is a conclusion, and not admissible. He should have stated what was done: *Williams v. State*, 40 Tex. Cr. Rep. 497, 51 S. W. 220. The court in this case, in stating when opinions are admissible, said: "Conclusions or opinions or a summary have been in some cases admitted in evidence where the same were of such a character that they could not be so detailed and presented to the minds of the jury as to impart to them the knowledge which the witnesses actually possessed; that is, mere language could not reproduce, and make palpable in the concrete to the jury, the actual fact in such cases. The conclusion of the witness admitted in evidence has been termed a shorthand rendering of the facts."

c. **Showing Intention or Motive.**—Declarations which show the intention or motive of the accused in committing the offense are but another phase of the expression of an opinion, and may or may not be a good dying declaration according to the circumstances.

Dying declarations which go to show the state of feeling which existed between the deceased and the prisoner, are not competent evidence: *Ben v. State*, 37 Ala. 103; *Reynolds v. State*, 68 Ala. 502. This is clearly true as to a state of feeling which previously existed. Hence, a statement that the accused shot him, which is merely an opinion based upon previous threats made, and what had previously occurred between them, is inadmissible: *Binns v. State*, 46 Ind. 311; *Warren v. State*, 9 Tex. App. 619, 35 Am. Rep. 745. And in *People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233, a portion of a declaration which purported to show a motive on the part of the accused, by a recital of facts occurring several days before, was held inadmissible. The same court, however, in *People v. Sanchez*, 24 Cal. 17, admitted in evidence the answer to the question why the defendant shot him, the reply being that there had been a quarrel between them, and they were going out to settle it. We question whether this was a fact so connected with the *res gestae* as to be admissible. In *State v. Petsch*, 43 S. C. 132, 20 S. E. 993, the court intimates that facts and circumstances immediately preceding the homicide which go to show the cause of the shooting are proper subjects of a dying declaration. Thus, a statement that the accused and others were skinning a beef which they had evidently stolen, when deceased came upon them, is admissible as part of a dying declaration as tending to show a motive for the shooting: *Medina v. State (Tex.)*, 63 S. W. 331. In *People v. Beverly*, 108 Mich. 509, 66 N. W. 379, it was said that dying declarations may include statements as to the cause and circumstances of the homicide. While in *State v. Lee*, 58 S. C. 335, 36 S. E. 706, declarations that the shooting was willful and malicious were admitted, there being testimony tending to show facts and circumstances within the declarant's knowledge, upon which his opinion might have been based.

If this opinion is sound, it must be upon the theory already stated that the opinion is the direct result of observation through his senses, and is not the result of a course of reasoning from collateral facts. Declarations as to anterior circumstances which tend to show malice on the part of the accused are inadmissible: *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287; unless they are directly connected with the occurrence. Conversations and conduct at and immediately preceding the homicide, and constituting a part of the *res gestae* of the occurrence, such as witnesses would be permitted to relate, may be proved by the dying declarations of the party killed. Such declarations are not confined to the immediate physical cause of death and the name of the slayer: *Wilkerson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990. In this case the declarant stated that he had caught his wife and the defendant in the act of adultery. Declarations as to who shot him and the reasons therefor were admitted in *Wagoner v. Territory (Ariz.)*, 51 Pac. 145, where there were suspicious relations existing between the defendant and the declarant's wife.

Mere belief on the part of a deceased as to the intention of the accused in shooting is not a good dying declaration: *McPherson v. State*, 22 Ga. 478. Hence a statement that he did not believe the defendant intended to kill him is a mere opinion and inadmissible: *State v. Wright*, 112 Iowa, 436, 84 N. W. 541. So, also, is a statement that the defendant was not to blame: *Ratteree v. State*, 53 Ga. 570. And a declaration that the defendant would not have killed him if he had been in his right mind: *Smith v. Commonwealth*, 13 Ky. Law Rep. 612, 17 S. W. 868. And a declaration that in the opinion of the declarant the infliction of the wound was accidental: *Kearney v. State*, 101 Ga. 803, 65 Am. St. Rep. 344, 29 S. E. 127. A statement as to the defendant's purpose in committing the offense is properly excluded: *State v. Donnelly*, 69 Iowa, 705, 58 Am. Rep. 234, 27 N. W. 369. In *Commonwealth v. Matthews*, 89 Ky. 287, 12 S. W. 333, however, the circumstances were such that the statement that the shooting was accidental was deemed the statement of a fact. Here the deceased said that he and the defendant were playing together, and that the shooting was an accident.

A statement that the defendant "shot him down like a dog" was held to be a statement of fact, and not the mere expression of an opinion, in *White v. State*, 100 Ga. 659, 28 S. E. 423. So is a dying statement that the defendant had no reason for making the deadly assault: *Boyle v. State*, 97 Ind. 322; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203. The court in this last case saying: "Whether there is any cause for an act must be a fact, but if it be conceded that there is a cause, then whether it was or was not adequate might well be deemed matter of opinion." A declarant's assertion that the accused shot him without cause is not an inference or opinion, but the statement of a fact, which is admissible as a

dying declaration: *Payne v. State*, 61 Miss. 161; *Powers v. State*, 74 Miss. 777, 21 South. 657. So, also, is the statement that the wound was made without any provocation on the declarant's part: *Wroe v. State*, 20 Ohio St. 460. And a declaration that he had been shot by a man that he had no reason to expect a shot from, that he had no reason to shoot, as no offense was given: *State v. Black*, 42 La. Ann. 861, 8 South. 594. By a decided weight of authority, such expressions as "the defendant cut me for nothing," or "killed me for nothing," are considered statements of fact and not mere opinions, and hence admissible as dying declarations: *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 South. 264; *Jordan v. State*, 82 Ala. 1, 2 South. 460; *Jordan v. State*, 81 Ala. 20, 1 South. 577; *Fuller v. State*, 117 Ala. 36, 23 South. 688; *Darby v. State*, 79 Ga. 63, 3 S. E. 663; *State v. Lee*, 58 S. C. 335, 36 S. E. 706; *Roberts v. State*, 5 Tex. App. 141. In Kentucky, however, a declaration that the deceased was killed "for nothing" is considered a mere matter of opinion, and not admissible as a dying declaration: *Collins v. Commonwealth*, 12 Bush, 271; *Jones v. Commonwealth*, 20 Ky. Law Rep. 355, 46 S. W. 217; *Commonwealth v. Matthews*, 89 Ky. 287, 12 S. W. 333.

A decedent's statement that the accused ought not to have shot, and that the deceased did not think he would shoot, is the statement of a fact, where it is an issue in the case as to whether the deceased was doing any act or making any demonstration toward the defendant, or that the deceased could have anticipated that the defendant would shoot him: *Sims v. State*, 36 Tex. Cr. Rep. 154, 36 S. W. 256.

A statement that the defendant picked a fuss with the deceased and was running over him, and because he objected the defendant killed him, is a mere conclusion of the witness unaccompanied by the facts and is not a good dying declaration: *State v. Elkins*, 101 Mo. 344, 14 S. W. 116. But the statement that the deceased and the defendant "had no fuss," was held to be properly admitted in evidence in *Luker v. Commonwealth*, 9 Ky. Law Rep. 385, 5 S. W. 354. While the same court in *Starr v. Commonwealth*, 97 Ky. 193, 30 S. W. 397, held that the declaration of the deceased that he did not know what made the accused shoot him, that they had always been good friends, did not constitute an admissible dying declaration. The declaration here, however, seems to have had no special reference to the act of killing, while in *Luker v. Commonwealth*, 9 Ky. Law Rep. 385, 5 S. W. 354, the statements were deemed to have related directly to the circumstances connected with the homicide.

VII. Condition of Person Making Declaration.

a. **Actual Danger of Death.**—Dying declarations, to be admissible, should be made when the declarant is in extremity, when he is at the point of death: *People v. Wood*, 2 Edm. Sel. Cas. 71; *Johnson v. State*, 47 Ala. 9; *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213. The declarant must in fact be at the point of

death: *Morgan v. State*, 31 Ind. 193; *Worthington v. State*, 92 Md. 222, 48 Atl. 355. He must be in actual danger of death: *Kilpatrick v. Commonwealth*, 31 Pa. St. 193. The fact that he was able to get out of bed and go to the window to explain the situation when injured is immaterial, and does not show that he was not in actual danger of death: *Jones v. State*, 71 Ind. 66. And as will subsequently be seen, the fact that he lived several days or even longer after he made his dying declaration is immaterial. In *McLean v. State* (Miss.), 12 South. 905, it was held that "one traveling around the neighborhood, and walking from place to place, and not in such extremity as to take to his bed, cannot be said to be in extremis, in any just sense," and the alleged dying declaration was, therefore, excluded. A declaration by a child, in explanation of his swollen face or a pain in his head, that his father had punished him, when there does not appear to be any apprehension of serious results from the injuries, is not admissible as a dying declaration: *State v. Dominique*, 30 Mo. 585; *Johnson v. State*, 63 Miss. 313.

b. Sense of Impending Death.

1. In General.—In order that dying declarations shall be admissible in evidence, they must be made under a sense of impending death. The declarant must know or think that he is in a dying state: See *Johnson v. State*, 47 Ala. 9; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *People v. Sanchez*, 24 Cal. 17; *People v. Samario*, 84 Cal. 484, 24 Pac. 283; *Whitaker v. State*, 79 Ga. 87, 3 S. E. 403; *Green v. State*, 154 Ind. 655, 57 N. E. 637; *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213; *State v. Ashworth*, 50 La. Ann. 94, 23 South. 270; *State v. Sadler*, 51 La. Ann. 1397, 26 South. 390; *Walston v. Commonwealth*, 16 B. Mon. 15; *Brown v. State*, 32 Miss. 433; *State v. Vaughan*, 152 Mo. 73, 53 S. W. 420; *Robbins v. State*, 8 Ohio St. 131; *Commonwealth v. Birriolo*, 197 Pa. St. 371, 47 Atl. 355; *Ex parte Meyers*, 33 Tex. Cr. Rep. 204, 26 S. W. 196; *Joslin v. State*, 75 Miss. 838, 23 South. 515; *State v. Head*, 60 S. C. 516, 39 S. E. 6; *Worthington v. State*, 92 Md. 222, 48 Atl. 355; *State v. Gay*, 18 Mont. 51, 44 Pac. 411; *Commonwealth v. Matthews*, 89 Ky. 287, 12 S. W. 333; *Lipscomb v. State*, 75 Miss. 559, 23 South. 210; *Lemons v. State*, 97 Tenn. 560, 37 S. W. 552; *State v. Center*, 35 Vt. 378; *Hall v. Commonwealth*, 89 Va. 171, 15 S. E. 517.

A declarant must be fully conscious of his condition, not as a thing of surmise and conjecture, or apprehension, but as a fixed and inevitable fact; *Morgan v. State*, 31 Ind. 193; *Smith v. State*, 9 Humph. 9. He must have plausible grounds for the belief that he will die: *Pulliam v. State*, 88 Ala. 1, 6 South. 839. And must be conscious of his condition at the time he makes his declaration: *Montgomery v. State*, 11 Ohio, 424; *Smith v. State*, 9 Humph. 9; *Logan v. State*, 9 Humph. 24; *Brown v. State*, 78 Miss. 637, 29 South. 519.

Hence where a man spit a quantity of blood from a knife wound in the abdomen, and his language showed that he was impressed with a sense of impending death, his declarations are admissible: *People v. Samario*, 84 Cal. 484, 24 Pac. 283. And where he repeatedly said he was going to die, and the doctors told him that he would, and that his wound was fatal, this is a sufficient showing that a declaration was made under a sense of impending death: *People v. Lem Dio*, 132 Cal. 199, 64 Pac. 265. Where a declarant repeatedly states that she will die, and continues so declaring up to the time of her death, a sufficient sense of impending death appears: *Worthington v. State*, 92 Md. 222, 48 Atl. 355. Especially where the circumstances surrounding the statement make it clear that the declarant was in a critical condition: *Gibson v. State*, 126 Ala. 59, 28 South. 673; *Gerald v. State*, 128 Ala. 6, 29 South. 614; *Richard v. State (Fla.)*, 29 South. 412. As where the wound was a mortal one: *State v. Elkins*, 101 Mo. 844, 14 S. W. 116; *State v. Fletcher*, 24 Or. 295, 33 Pac. 575; *People v. Lee*, 17 Cal. 76. And where he said, "I must die; I cannot live; what will become of my poor wife and mother?" this was deemed sufficient to indicate a sense of impending death: *State v. Johnson*, 76 Mo. 121. But the mere statement of a declarant that he believed he would die, where it does not appear from other evidence that he had a sense of impending death, is not sufficient: *Vaughan v. Commonwealth*, 86 Ky. 431, 6 S. W. 153; *Bates v. Commonwealth (Ky.)*, 19 S. W. 928. Neither is the mere declaration that his wound would kill him: *Barnes v. Commonwealth*, 22 Ky. Law Rep. 1802, 61 S. W. 733. A statement that he would die, made when in great distress, breathed badly, and complained of violent suffering in the head and breast, sufficiently shows a sense of impending death: *Brakefield v. State*, 1 Sneed, 214. So where one was shot in the bowels, and was taken very sick, vomited, and complained of bleeding internally, his statement that he was bound to die sufficiently shows his belief that he would: *Miller v. State*, 27 Tex. App. 63, 10 S. W. 445. See for other statements made while the declarant was suffering great pain, and which indicate a sense of impending death, *State v. Gay*, 18 Mont. 51, 44 Pac. 411.

The following circumstances have been held sufficient to show a sense of impending death: A statement that he was very badly wounded and never expected to get over it, made just before he became speechless: *State v. Nance*, 25 S. C. 168. A statement that he had given up all hope, made when the circumstances showed he was about to die: *Pace v. Commonwealth*, 89 Ky. 204, 12 S. W. 271. A statement that he was bound to die and could not get well: *Dillard v. State*, 58 Miss. 368. A statement that he hoped he would live long enough to take the gun home, where he actually died twenty minutes later: *Commonwealth v. Matthews*, 89 Ky. 287, 12 S. W. 333. Where the written statement of the deceased recites that he is not long for this world, he is told he will die, and makes preparation for

that event: *Hammil v. State*, 90 Ala. 577, 8 South. 380. Where the deceased said he would die, and his physician told him he had only a few hours to live: *Du Bose v. State*, 120 Ala. 300, 25 South. 185. Where the declarant expressed no hope of recovery, his physician told him he would die, and he told his daughter all was well, when she wept over him: *Sims v. State*, 36 Tex. Cr. Rep. 154, 36 S. W. 256. The wife's testimony that her husband knew he would die is sufficient, the evidence showing that she was in a position to know the condition of his mind: *State v. Johnson*, 72 Iowa, 393, 34 N. W. 177. Where, at the time the declaration is made, the declarant was in the throes of death, declared he was going to die, and asked a bystander to pray for him: *Lipscomb v. State*, 75 Miss. 559, 23 South. 210. A statement that he was killed this time, and requesting that another be sent for to write his affidavit, adding, "I am afraid you cannot get him here in time": *Toliver v. Commonwealth*, 20 Ky. Law Rep. 906, 47 S. W. 1082. Where he was shot through the lung, causing blood to spurt out when he gasped or coughed, and he repeatedly stated that he was going to die: *Stephens v. Commonwealth*, 20 Ky. Law Rep. 544, 47 S. W. 229. Where the injured man was a physician, who explained the nature of his injury and expressed the conviction that his death would inevitably occur, and directed the disposition of his property in contemplation of death: *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465. Where the deceased said he would die, his physician so told him, and at the time of making his declaration said he was going to take a long sleep: *Lemons v. State*, 97 Tenn. 560, 37 S. W. 552.

The fact that a declarant sends for a priest or a minister, and makes other similar preparations, is of great weight in determining whether he was aware of his dying condition: See *People v. Lee*, 17 Cal. 76; *Hammil v. State*, 90 Ala. 577, 8 South. 380; *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749; *State v. Jones*, 38 La. Ann. 792. Especially where the last rites of the church have been administered: *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458. Where the declarant says it is useless to send for a doctor, that he will die before the doctor gets there, this sufficiently shows a sense of impending death: *State v. Jones*, 47 La. Ann. 1524, 18 South. 515. But merely to tell a doctor he can do her no good and need not return is not sufficient: *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953. The sending for medical aid merely to relieve one from intense pain does not show that the victim had any hope of recovery: *State v. Evans*, 124 Mo. 397, 28 S. W. 8.

Where it merely appears that the physician said the wound was a grave one and the deceased was in a critical condition, and the deceased remarked, when they cut his coat off, that he did not suppose he would have any more use for it, no sufficient sense of impending death appears: *Ledbetter v. State*, 23 Tex. App. 247, 5 S. W. 226. A statement that she would die, coupled with the remark

that if she recovered she would not go again to the place where she was injured, made at a time when neither her physician nor attendants regarded her as dangerously ill, is not a sufficient showing of a sense of impending death: *State v. Center*, 35 Vt. 378. Neither is the declaration, "Oh, my people!" uttered by a slave soon after a mortal wound had been inflicted upon him: *Lewis v. State*, 9 Smedes & M. 115. Nor the mere statement that he would die, followed by the declaration that if he should die, he wanted his sister in Germany to have three hundred dollars, where the physicians do not tell him he is likely to die: *State v. Simon*, 50 Mo. 370. Nor where the circumstances show that the injuries were not considered fatal, he did not send for a physician, no one revealed to him the gravity of his wound, and he asked one to sell him goods on credit and risk his getting well to pay for them: *Bell v. State*, 72 Miss. 507, 17 South. 232. Nor is it sufficient that he thought he should ultimately never recover: *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229. Nor the mere expression that he regretted to be taken away from the support of his family, where he was not informed and did not say that he would die: *Starks v. State* (Miss.), 6 South. 643. Nor the statement that he was shot and might get over it or might not: *Whitaker v. State*, 79 Ga. 87, 3 S. E. 403. Nor the declaration that he was shot bad and did not expect to get over it: *State v. Jagers*, 58 S. C. 41, 36 S. E. 434. Nor the fact that the declarant appeared to be suffering and was praying God to help him, and to have mercy on him: *Cole v. State*, 105 Ala. 76, 16 South. 762. Declarations made by a decedent before he is advised that he is going to die, or expressed a belief to that effect, are not dying declarations: *Collins v. People*, 194 Ill. 506, 62 N. E. 902. A statement of the deceased that he hoped to recover, made ten minutes after an alleged dying declaration, raises a doubt as to the absence of all hope at the time the declaration was made: *Ex parte Meyers*, 33 Tex. Cr. Rep. 204, 26 S. W. 196.

2. **Declaration Need not State Belief in Death.**—It is not necessary, in order to render dying declarations admissible, that the declarant should state, in so many words, that he was speaking under a sense of impending death: *In re Orpen*, 86 Fed. 760; *Morgan v. State*, 31 Ind. 193; *Wills v. State*, 74 Ala. 21; *Ward v. State*, 78 Ala. 441; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *Newberry v. State*, 68 Ark. 355, 58 S. W. 351; *People v. Sanchez*, 24 Cal. 17; *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266; *People v. Yokum*, 118 Cal. 437, 50 Pac. 686; *Lester v. State*, 37 Fla. 382, 20 South. 232; *State v. Schmidt*, 73 Iowa. 469, 35 N. W. 590; *Hall v. Commonwealth*, 89 Va. 171, 15 S. E. 517; *Hill v. Commonwealth*, 2 Gratt. 594; *Cartis v. State*, 14 Lea, 502; *State v. Russell*, 13 Mont. 164, 32 Pac. 854; *Austin v. Commonwealth*, 19 Ky. Law Rep. 474, 40 S. W. 905; *Kilpatrick v. Commonwealth*, 31 Pa. St. 198; *Anthony v. State*, Melga. 265, 33 Am. Dec. 143; *Nelson v. State*, 7 Humph. 542; *People v.*

Lonsdale, 122 Mich. 388, 81 N. W. 277; Keaton v. State (Tex.), 57 S. W. 1125; State v. Power, 24 Wash. 34, 63 Pac. 1112.

It is sufficient if it satisfactorily appears that the dying declaration was made in the knowledge of impending death: *In re Orpen*, 86 Fed. 760. Or if his condition was such that, of necessity, such an impression must have existed on his mind: *Morgan v. State*, 31 Ind. 193. That declarations were made under a sense of impending death may be determined from all the attendant circumstances: *Ward v. State*, 78 Ala. 441; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *People v. Sanchez*, 24 Cal. 17; *People v. Yokum*, 118 Cal. 437, 50 Pac. 686; *Lester v. State*, 37 Fla. 382, 20 South. 232; *Hill v. Commonwealth*, 2 Gratt. 594; *Curtis v. State*, 14 Lea, 502; *Anthony v. State*, Melgs, 265, 33 Am. Dec. 143; *State v. Evans*, 124 Mo. 397, 28 S. W. 8.

But it should appear either from his own statements or from surrounding circumstances that he realized that death was imminent: *May v. State*, 55 Ala. 39. It is enough if it satisfactorily appears in any mode that his declarations were made under a sense of impending death, whether by direct language, or inferred from his evident danger, or the opinions of physicians stated to him, or from his conduct or other circumstances, all of which are resorted to in order to ascertain the state of the declarant's mind: *Newberry v. State*, 68 Ark. 355, 58 S. W. 351; *McLean v. State*, 16 Ala. 672; *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266; *State v. Russell*, 13 Mont. 164, 32 Pac. 854; *Kilpatrick v. Commonwealth*, 31 Pa. St. 198; *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277; *Keaton v. State* (Tex.), 57 S. W. 1125; *State v. Nash*, 7 Iowa, 347; *State v. Scott*, 12 La. Ann. 274.

A written declaration need not recite that the declarant had no hope of recovery: *Austin v. Commonwealth*, 19 Ky. Law. Rep. 474, 40 S. W. 905. The state of the declarant's mind may be made to appear from other testimony: *Fitzgerald v. State*, 11 Neb. 577, 10 N. W. 495; *Collins v. State*, 46 Neb. 37, 64 N. W. 432. The nature of the wound is an important factor in determining whether the declarant was under a sense of impending death, where no direct statement to that effect is made: *McHargue v. Commonwealth* (Ky.), 23 S. W. 849; *Campbell v. State*, 11 Ga. 353; *State v. Gillick*, 7 Iowa, 287. As was stated in *Anthony v. State*, Melgs, 265, 33 Am. Dec. 143, the circumstances from which the consciousness of danger may be inferred are "the dangerous nature and character of the wound, the state and illness of the party, her sinking condition, and her statement of extreme suffering, and those symptoms which usually precede death."

Even if a dying declaration expressly recites that it was made under a sense of impending death, this is not conclusive, where the circumstances surrounding the making of the declaration, the con-

dition of the declarant, and the testimony of the physicians show the contrary: *People v. Fuhrig*, 127 Cal. 412, 59 Pac. 698.

3. **Belief in Imminence of Death.**—To render dying declarations admissible they must be made in view of impending and inevitable death, and it is not sufficient that they are made merely in fear or apprehension of death: *Brakefield v. State*, 1 Sneed, 214. It is not enough that the declarant should have thought that he should ultimately never recover: *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229. But he must feel that death is certain to follow almost immediately: *Tracy v. People*, 97 Ill. 101; *Morgan v. State*, 31 Ind. 193; *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229; *Smith v. State*, 9 Humph. 9. There must be evidence that death was thought to be imminent: *State v. Taylor*, 56 S. C. 360, 34 S. E. 939. In some of the cases the rule is expressed as being that the declarant must be under apprehension of immediate death: *Campbell v. State*, 11 Ga. 353. But while he must believe that death is impending in the sense that it is not distant: *Kilpatrick v. Commonwealth*, 31 Pa. St. 198; it is sufficient if he believes it to be approaching and certain, and the better holding is that he need not believe that he would die immediately: *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *State v. Sadler*, 51 La. Ann. 1397, 26 South. 390; *State v. Keenan*, 38 La. Ann. 660; *State v. Newhouse*, 39 La. Ann. 862, 2 South. 799; *State v. Nash*, 7 Iowa, 347. As was said in *State v. Sullivan*, 20 R. L. 114, 37 Atl. 673, it is only necessary that the declarant should have had no expectation of surviving the injury inflicted by the defendant.

4. **Expectation of Recovery.**—A declarant must be without hope of recovery: *Dixon v. State*, 13 Fla. 636; *Barnett v. People*, 54 Ill. 325; *State v. Garrison*, 147 Mo. 548, 49 S. W. 508; *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229. As some of the cases express it, there must be no hope whatever of recovery: *State v. Simon*, 50 Mo. 370. Every hope of this world must be gone: *People v. Ah Dat*, 49 Cal. 652. And if he had any expectation or hope of recovery, however slight, his dying declaration is not admissible in evidence: *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30; *Commonwealth v. Roberts*, 108 Mass. 296. Any expectation of recovery will render the declarations inadmissible: *Graves v. People*, 18 Colo. 170, 32 Pac. 63; *Commonwealth v. Bishop*, 165 Mass. 148, 42 N. E. 560; *State v. McCanon*, 51 Mo. 160. And this is true though death actually ensued within an hour after making the declaration: *Rakes v. People*, 2 Neb. 157.

When a declaration was actually made under a sense of impending death, the fact that he subsequently stated that he hoped for the best, in answer to his physician's statement that he would recover, is immaterial: *Highsmith v. State* (Tex.), 50 S. W. 723. As is also such an exclamation as "Save me if you can!": *State v. Tilgh-*

man, 11 Ired. 513. To say "I want you to do all you can for me," does not necessarily show that the declarant hoped to recover: *McQueen v. State*, 94 Ala. 50, 10 South. 433. Neither does the statement that he was not a "quitter," where he had been advised that he would die, and replied that he expected to: *State v. Young*, 104 Iowa, 730, 74 N. W. 693. The expression that he would die unless he got speedy relief does not sufficiently show a certainty of impending dissolution: *Adwell v. Commonwealth*, 17 B. Mon. 310.

The fact of sending for a physician may in itself indicate that the declarant still had hope of recovery: *Matherly v. Commonwealth* (Ky.), 19 S. W. 977. Especially where the doctor is repeatedly sent for: *Morgan v. State*, 31 Ind. 193; and persuades him that he will recover: *State v. Nash*, 7 Iowa, 347. But the mere fact that a doctor was sent for is not conclusive that he had hope of recovery, and that his declarations were not made under a sense of impending death: *Baker v. Commonwealth*, 20 Ky. Law Rep. 1778, 50 S. W. 54; *McQueen v. State*, 103 Ala. 12, 15 South. 824. So where a physician is sent for merely to relieve the declarant from immediate and intense pain, this does not indicate a lingering hope of recovery, and the dying declaration may be good: *State v. Evans*, 124 Mo. 397, 28 S. W. 8. And a request for a physician to help her, where from the circumstances it is apparent that the declarant desired relief from present pain only, no hope of recovery is shown: *Johnson v. State*, 17 Ala. 613.

The statement, "Who knows but I may get well," implies the possibility of recovery, so as to render a dying declaration inadmissible: *Jackson v. Commonwealth*, 19 Gratt. 656. So, also, where the declarant made no preparation for death, used profane language, and spoke of resuming business and being married: *Digby v. People*, 113 Ill. 123, 55 Am. Rep. 402. And where his wound was healing, he was up and about, and said he wanted to get well to kill the defendant: *Irby v. State*, 25 Tex. App. 203, 7 S. W. 705.

A dying declaration is admissible if actually made under a sense of impending death, although a hope of recovery was subsequently entertained: *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *State v. Shaffer*, 23 Or. 555, 32 Pac. 545; *Swisher v. Commonwealth*, 26 Gratt. 963, 21 Am. Rep. 330; *State v. Turlington*, 102 Mo. 642, 15 S. W. 141. That the declarant had said several hours before that he did not expect to die is immaterial, if at the time the declaration is made he was actually conscious of impending death: *Small v. Commonwealth*, 91 Pa. St. 304. See, also, *Polk v. State*, 35 Tex. Cr. Rep. 495, 34 S. W. 633.

c. **Belief and Hopes of Others.**—A dying declaration is admissible in evidence, if made under a present apprehension that death will come soon as a result of his wound, regardless of what others may at the time think: *State v. Peake*, 10 N. J. L. 177. The mere opinion and beliefs of others are in themselves unimportant if they

have no influence upon the mind of the declarant, for it is the declarant's own belief that he is in a dangerous condition that is the test in determining the admissibility of dying declarations: *Worthington v. State*, 92 Md. 222, 48 Atl. 355. Hence the fact that the declarant was informed by another that he would die is unimportant, where it is not shown that he thought so himself: *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14. It is immaterial that the declarant's family or friends were impressed with the belief that he would recover: *Sylvester v. State*, 72 Ala. 201; *Jordan v. State*, 81 Ala. 20, 1 South. 577; *Jordan v. State*, 82 Ala. 1, 2 South. 460; *People v. Simpson*, 48 Mich. 474, 12 N. W. 662. And the fact that friends encouraged him is likewise unimportant: *Wallace v. State*, 90 Ga. 117, 15 S. E. 700.

A declarant need not be informed by a physician that he will die: *State v. Yee Wee* (Idaho), 61 Pac. 588. And the fact that his physician held out hope to him is immaterial, if in fact the declarant actually believed that he would not recover: *Hussey v. State*, 87 Ala. 121, 6 South. 420; *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93; *State v. Mills*, 91 N. C. 581; *State v. Caldwell*, 115 N. C. 794, 20 S. E. 523; *Worthington v. State*, 92 Md. 222, 48 Atl. 355; *Wheeler v. State*, 112 Ga. 43, 37 S. E. 126. So, also, if the physician tells a declarant that he cannot recover, his dying declaration will not be admissible if he did not give up hope and still thought he might get well: *Peak v. State*, 50 N. J. L. 179, 12 Atl. 701; *Westbrook v. People*, 126 Ill. 81, 18 N. E. 304; *Young v. State* (Ala.), 10 South. 913. The opinion of a declarant's physician and the physician's statements to him may be of importance, however, in ascertaining whether or not the declarant had in fact given up all hope of recovery: See *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266; *Newberry v. State*, 68 Ark. 355, 58 S. W. 351; *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277; *State v. Russell*, 13 Mont. 164, 32 Pac. 854. So where the physician held out hope of recovery, and eventually persuaded the declarant that he might live, a dying declaration is inadmissible: See *State v. Nash*, 7 Iowa, 347. See, also, *State v. Buchanan*, 1 Houst. C. C. 79, and *People v. Robinson*, 2 Park. C. C. 235. But where the physicians told him he would die, and it was apparent that he believed them and thought the same, his dying declaration is admissible: *West v. State*, 76 Ala. 98; *People v. Ramirez*, 73 Cal. 403, 15 Pac. 33; *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266; *People v. Hawes*, 98 Cal. 648, 33 Pac. 791; *Walton v. State*, 79 Ga. 446, 5 S. E. 203; *State v. Leeper*, 70 Iowa, 748, 30 N. W. 501; *State v. Baldwin*, 79 Iowa, 714, 45 N. W. 297; *State v. Aldrich*, 50 Kan. 666, 32 Pac. 408; *Commonwealth v. Brewer*, 164 Mass. 577, 42 N. E. 92; *Brotherton v. People*, 75 N. Y. 159; *Pierson v. State*, 21 Tex. App. 14, 17 S. W. 468; *Bull v. Commonwealth*, 14 Gratt. 613. In *State v. Wensell*, 98 Mo. 137, 11 S. W. 614, a dying declaration was admitted where the declarant stated that he had

no hope of recovery, and made the statement upon the advice of his friend and medical attendant, although at the time of being advised of his condition by the latter he said he did not feel that he would die, but had confidence in his physician.

VIII. Time of Making Declarations.

a. **When the Sense of Impending Death should Appear.**—It is immaterial whether the statement that the declarant believes he is going to die is made just before or just after his dying declaration, if there has been no change in his condition and it is manifest that he is under the fear of impending death: *State v. Peace*, 1 Jones, 251; *King v. State*, 34 Tex. Cr. Rep. 228, 29 S. W. 1086; *Winfrey v. State* (Tex.), 56 S. W. 919; *Worthington v. State*, 92 Md. 222, 48 Atl. 355. Indeed, it is unnecessary to expressly state at all that the deceased expected to die: See *King v. State*, 34 Tex. Cr. Rep. 228, 29 S. W. 1086. We have already seen that the expectation of death may be shown by circumstances. And as clearly pointed out in *Worthington v. State*, 92 Md. 222, 48 Atl. 355, if the fact that the declarant anticipated death preceded the dying declaration this is sufficient, whether he actually stated that he expected to die, before making his dying declaration, or not.

A dying declaration was admitted in *People v. Yokum*, 118 Cal. 437, 50 Pac. 686, where the declarant stated that he would die, about forty-five minutes prior thereto. And where his belief in his impending dissolution is stated just after his dying declaration is made, such declaration is admissible: *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310. In *State v. Jagers*, 58 S. C. 41, 36 S. E. 434, a dying declaration was held inadmissible when made six hours after the declarant stated he believed he would die, when at the time of making the declaration he appeared to be resting easily. But the fact that the statement that he would die was made several hours before making a dying declaration is immaterial if his condition shows that he was under a sense of impending death: *Norfleet v. Commonwealth* (Ky.), 33 S. W. 938. A statement that he was killed, made half an hour after an alleged dying declaration, does not sufficiently show a sense of impending death at the time of making the declaration: *Justice v. State*, 99 Ala. 180, 13 South. 658. A dying declaration is good when made within thirteen minutes after the declarant stated that he expected to die: *State v. Trusty*, 1 Penne. (Del.) 319, 40 Atl. 766.

b. **When the Declaration Itself may be Made.**—A dying declaration need not be made immediately before death: *State v. Poll*, 1 Hawks, 442, 9 Am. Dec. 655; *State v. Power*, 24 Wash. 34, 63 Pac. 1112. And a statement made a short time before death is not admissible as a dying declaration, if the declarant seemed to be improving at the time and thought he was in no immediate danger of death: *State v. Taylor*, 56 S. C. 360, 34 S. E. 939. The length of

time between the making of the declaration and the declarant's death is usually unimportant, the test of the admissibility of declarations being whether they were in fact made under a sense of impending death. As is pointed out in *State v. Schmidt*, 73 Iowa, 469, 35 N. W. 590: "The length of time which elapsed between the declarations and the declarant's death furnishes no rule for the admission or rejection of the evidence, though, in the absence of any better evidence, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending." To the same effect, see *Rakes v. People*, 2 Neb. 157. The fact that a declarant survived for some time is immaterial when his declaration was actually made under a sense of impending death: *State v. Daniel*, 31 La. Ann. 91; *Jones v. State*, 71 Ind. 66; *Commonwealth v. Cooper*, 5 Allen, 495, 81 Am. Dec. 762. As illustrative of the rule that the length of time which may elapse between the time of making the declaration and the declarant's death is of no consequence of itself, the following cases may be cited: A survival of two days after making the declaration was held to be immaterial, in *Kehoe v. Commonwealth*, 85 Pa. St. 127; *State v. Power*, 24 Wash. 34, 63 Pac. 1112; *State v. Webster*, 21 Wash. 63, 57 Pac. 361. So of three days, in *Oliver v. State*, 17 Ala. 587; *State v. Umble*, 115 Mo. 452, 22 S. W. 378; *Hughes v. State*, 109 Wis. 397, 85 N. W. 333; *State v. Banister*, 35 S. C. 290, 14 S. E. 678. Five days, in *State v. Daniel*, 31 La. Ann. 91; *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046. Six days, in *State v. Center*, 35 Vt. 378; *People v. Weaver*, 108 Mich. 649, 66 N. W. 567; *Evans v. State*, 58 Ark. 47, 22 S. W. 1026; *State v. Wilson*, 121 Mo. 434, 26 S. W. 357. Seven days, in *Kilgore v. State*, 74 Ala. 1. Ten days, in *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93. Eleven days, in *Jones v. State*, 71 Ind. 66. Twelve days, in *People v. Burt*, 51 App. Div. 106, 64 N. Y. Supp. 417. Sixteen days, in *Baxter v. State*, 15 Lea, 657. Seventeen days, in *Commonwealth v. Cooper*, 5 Allen, 495, 81 Am. Dec. 762; *Lowry v. State*, 12 Lea, 142. Twenty-five days, in *State v. Oliver*, 2 Houst. 585. Three weeks, in *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465. Several weeks, in *Titus v. State*, 117 Ala. 16, 23 South. 77. A month and a half, in *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750. Two months, in *State v. Nocton*, 121 Mo. 537, 26 S. W. 551; *Boulden v. State*, 102 Ala. 78, 15 South. 341. The fact that the declarant lived five months after making his statement, contrary to all expectations, was held not to render the dying declarations inadmissible, in *State v. Craine*, 120 N. C. 601, 27 S. E. 72.

A declaration made even one hour before death is not admissible as a dying declaration if the declarant had any hope of recovery: *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30. Statements made three months before death were held not to be good dying declarations in *State v. Belcher*, 13 S. C. 459, where the sense of impending death did not sufficiently appear. A similar ruling was made in

Starr v. Commonwealth, 97 Ky. 193, 30 S. W. 397, where declarations were made seven months prior to death.

The authorities are practically a unit to the effect that declarations which are uttered under a sense of impending dissolution are admissible in evidence as dying declarations, although death did not ensue immediately, and in fact did not occur until after the lapse of considerable time: See, especially, **Boulden v. State**, 102 Ala. 78, 15 South. 341; **Commonwealth v. Cooper**, 5 Allen, 495, 81 Am. Dec. 762. It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders a dying declaration admissible in evidence: **State v. Nocton**, 121 Mo. 537, 20 S. W. 551.

IX. Declarations as Part of Res Gestae.

A deceased may have made declarations prior to his death which are not admissible as dying declarations, because not made under a sense of impending dissolution, and yet if they are made so near the time of the homicide as to be a part of the transaction itself, they may be admissible as a part of the res gestae: See **Healy v. People**, 163 Ill. 372, 45 N. E. 230; **Goodall v. State**, 1 Or. 333, 80 Am. Dec. 396; **Fulcher v. State**, 28 Tex. App. 465, 13 S. W. 750; **State v. Alcorn (Idaho)**, 64 Pac. 1014. We merely call attention to this class of dying declarations, because the question is frequently confused with real dying declarations. Care, also, should be taken to distinguish between declarations which are admitted because they form a part of the res gestae, and dying declarations which are only admitted when their subject matter has reference to facts and circumstances which constitute a part of the res gestae. In the first class, the declarations themselves are a part of the res gestae; in the latter, it is the facts and circumstances of which the dying declarations speak that form the res gestae: See **McLean v. State**, 16 Ala. 672; **Johnson v. State**, 102 Ala. 1, 16 South. 99; **Bush v. State**, 109 Ga. 120, 34 S. E. 298; **Wilkerson v. State**, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990; **Goubb v. State (Tex.)**, 63 S. W. 314.

X. Prosecutions in Which Declarations are Admissible.

a. Homicide.

1. Death of a Declarant Under Inquiry.—As a general rule, dying declarations are only admissible in evidence where the death of the declarant is the subject of the charge: **Johnson v. State**, 47 Ala. 9; **State v. Medlicott**, 9 Kan. 283; **State v. Bohan**, 15 Kan. 407; **Wright v. State**, 41 Tex. 246. As was said in **Hudson v. State**, 3 Cold. 355, dying declarations are restricted to the trial of the identical homicide of the person who makes the declaration.

2. Death of Other than Declarant.—The rule is well settled that the dying declarations of one person cannot be received as proof of guilt against a party charged with murdering some other person:

State v. Bohan, 15 Kan. 407; and see the cases subsequently cited. And this is true notwithstanding that both the declarant and the person of whose homicide the defendant is charged were killed at the same time and by the same act: State v. Westfall, 49 Iowa, 328; State v. Bohan, 15 Kan. 407; State v. Fitzhugh, 2 Or. 227; Krebs v. State, 3 Tex. App. 348; Radford v. State, 33 Tex. Cr. Rep. 520, 27 S. W. 143.

The same rule holds good where two persons are charged with the commission of a crime, and one of them makes a declaration just before his death exonerating the other. Such declaration is not admissible in evidence in favor of the accused: Mitchell v. Commonwealth, 12 Ky. Law Rep. 458, 14 S. W. 489.

The reason upon which the rule rests was admirably stated in State v. Bohan, 15 Kan. 407, the court pointing out that the admission of dying declarations forms an exception to the general rule that excludes hearsay testimony. "Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer, by putting the witness, and generally the sole witness, of his crime beyond the power of the court, by killing him, shall not thereby escape the consequences of his crime. On no other ground can the admission of such testimony be justified." And the court shows that no such necessity exists where the death of anyone else than the declarant is the subject of the inquiry, saying that "it would be as difficult to suggest a case where, as in this, two men are killed at or near the same time, that any necessity exists for the admission of the statement of the one whose death was not the subject of the inquiry, as it is in any other criminal case where a material witness is dead."

In Louisiana the dying declarations of one not the person for whose murder the accused is on trial are admissible when it is shown as a matter of fact that the declarant was mortally wounded in the same difficulty: State v. Wilson, 23 La. Ann. 558. And a similar rule was laid down in State v. Terrell, 12 Rich. 321, though it seems doubtful whether later cases follow this rule in South Carolina: See State v. Banister, 35 S. C. 90, 14 S. E. 678.

These cases have been severely criticised in other jurisdictions, and are opposed to the entire weight of authority elsewhere. Brown v. Commonwealth, 73 Pa. St. 321, 13 Am. Rep. 740, disapproved the rule they established, but distinguished the case in hand apparently on the ground that it did not clearly appear that the killing of both decedents was done by the same person.

b. **Abortion.**—The rule of the principal case, that dying declarations are admissible in evidence in prosecutions for abortion, where the death of the woman is an element in the offense, is sustained by the weight of authority. The question was elaborately discussed by Elliott, C. J., in Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815, the court reaching the conclusion that dying declarations

are admissible in evidence, if the death of the woman is an essential element in the offense. To the same effect see *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429, 27 N. E. 866. And see *Railing v. Commonwealth*, 110 Pa. St. 100, 1 Atl. 314. Where the death of the woman is not a constituent element in itself of the offense of abortion, but simply determines the character of the penalty, dying declarations are not admissible though death has ensued: *Railing v. Commonwealth*, 110 Pa. St. 100, 1 Atl. 314. Hence under an ordinary prosecution for abortion, dying declarations would not be admissible: *Commonwealth v. Homer*, 153 Mass. 343, 26 N. E. 872; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *People v. Davis*, 56 N. Y. 95.

Where there is a prosecution for homicide which has been caused by an abortion, the death of the woman is under investigation, and her dying declarations are clearly admissible: *State v. Pearce*, 56 Minn. 226, 57 N. W. 652; *State v. Lodge*, 9 Houst. 542, 33 Atl. 312; *State v. Alcorn* (Idaho, Apr. 29, 1901), 64 Pac. 1014; *State v. Leeper*, 70 Iowa, 748, 30 N. W. 501; *State v. Baldwin*, 79 Iowa, 714, 45 N. W. 297; *Peoples v. Commonwealth*, 87 Ky. 488, 9 S. W. 509, 810; *People v. Olmstead*, 30 Mich. 431; *Worthington v. State*, 92 Md. 222, 48 Atl. 355; *State v. Dickinson*, 41 Wis. 299.

Dying declarations may by statute be made admissible in evidence in prosecution for abortion: *Commonwealth v. Homer*, 153 Mass. 343, 26 N. E. 872.

c. *Other Cases.*—A misapprehension of the true ground upon which dying declarations were held to be admissible has influenced the courts in some early decisions to admit such evidence in other than homicide cases: See *State v. Bohan*, 15 Kan. 407. Thus in *McFarland v. Shaw*, 2 Car. Law Rep. 102, in an action by a father for the seduction of his daughter, the dying declarations of the daughter charging the defendant with having been her seducer were admitted in evidence. This case was expressly overruled in *Barfield v. Britt*, 2 Jones, 41, 62 Am. Dec. 190, where dying declarations were held to be inadmissible in an action of slander, the court holding that dying declarations, as such, were not admissible in civil cases. The rule now seems to be universal in this country that dying declarations are not admissible in civil cases: See *Wilson v. Boerem*, 15 Johns. 286, *Pettiford v. Mayo*, 117 N. C. 27, 23 S. E. 252. Even where the action is brought to recover damages for negligence in causing the death of another: *Marshall v. Chicago etc. Ry. Co.*, 48 Ill. 475, 95 Am. Dec. 561. Dying declaration of a woman who died in childbirth that the defendant was the father of her child are not admissible in an action for seduction brought by the woman's father: *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456. In an action against an administrator on a note executed by the intestate, the dying declaration of the intestate that he did not owe

a cent in the world is properly excluded: *Pettiford v. Mayo*, 117 N. C. 27, 23 S. E. 252.

Dying declarations, also, are inadmissible in criminal cases, where the death of the declarant is not under inquiry and does not constitute the gist of the offense: See *Wilson v. Boerem*, 15 Johns. 286. They are not admissible in a prosecution for robbery, although the party died from violence used against him in its commission: *Rex v. Lord*, 4 Car. & P. 233. And see *Hudson v. State*, 3 Cold. 355. The same is true of a prosecution for burglary: *People v. Hall*, 94 Cal. 595, 30 Pac. 7. And of a trial under an indictment for carnal knowledge or abuse of a female child: *Johnson v. State*, 50 Ala. 456.

BULLOCK v. STATE.

[65 N. J. L. 557, 47 Atl. 62.]

MURDER.—AN INDICTMENT FOLLOWING THE STATUTORY LANGUAGE, charging that the deceased "willfully, feloniously, deliberately and of his malice aforethought did kill and murder, contrary to the form of the statute," is sufficient to charge the crime of murder in the first degree. (p. 670.)

MURDER—KILLING AN OFFICER.—AN INDICTMENT in the prescribed statutory form is sufficient for the killing of an officer in the execution of his office, without alleging that the deceased was an officer. (p. 670.)

JURY TRIAL—CHOICE BETWEEN METHODS.—A party, in either a civil or criminal case, has no vested or legal right to choose which of two methods provided by law for the selection of juries for the trial of a case shall be adopted by the court. (p. 671.)

CONSTITUTIONAL LAW — STATE AND INDIVIDUAL ACTION.—THE FOURTEENTH AMENDMENT to the United State constitution relates to state action exclusively, and was designed as a protection against acts of the state and not the acts of persons. (pp. 671, 672.)

JURY—PANEL.—UPON THE TRIAL OF A COLORED MAN the absence of negroes from the panel of jurors is not error in the absence of proof that this exclusion was done designedly, or that such persons were omitted otherwise than in the same way that white citizens not selected were omitted. (p. 673.)

CONFESSION—INVOLUNTARY.—Where officers search a prisoner, and then inform him that it will be easier for him if he tells all about the crime, a confession procured under such circumstances is involuntary and inadmissible in evidence. (p. 673.)

A CONFESSION MADE BY A PRISONER TO AN OFFICER IN WHOSE CUSTODY HE IS can be received in evidence only when it appears that it was voluntary. (p. 674.)

TO BE VOLUNTARY, A CONFESSION must not be extorted by threats or obtained by any direct or implied promise relating to some benefit to be derived by the prisoner in the criminal prosecution. (p. 674.)

THE GROUND ON WHICH AN INVOLUNTARY CONFESSION IS EXCLUDED is that the accused may have been induced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth. (p. 674.)

WHERE PROMISES OR THREATS HAVE BEEN ONCE USED TO OBTAIN AN INVOLUNTARY CONFESSION, all subsequent admissions of the same or like facts will be rejected, unless from the circumstances there is good reason to presume that the hope or fear that influenced the first confession has been effectually dispelled. (p. 674.)

CONFESSIONS—IMPROPER INFLUENCE DISPELLED.—Where it appears to the satisfaction of the judge that the improper influence used to obtain a confession was totally done away with before a second confession was made, the latter is admissible in evidence. (p. 674.)

CONFESSION — VOLUNTARY — QUESTION OF FACT.—Whether a confession was made when the mind of the prisoner was laboring under, or was free from, the effects of a previous improper influence, presents a question of fact for the trial court. (p. 675.)

CONFESSION — VOLUNTARY — WHEN QUESTION FOR JURY.—Where there may be doubt from the whole evidence whether or not the confession was voluntary, the question should be left to the jury, with a direction to reject it, if they are satisfied it was not voluntary. (p. 675.)

OFFICERS—VACATING.—THE FAILURE OF AN OFFICER TO RENEW HIS BOND within the time prescribed by statute does not per se vacate the office, but he remains an officer with a defeasible title until a judgment of forfeiture is pronounced. (p. 677.)

MANSLAUGHTER.—WHERE AN OFFICER, IN EXECUTING HIS OFFICE, PROCEEDS IRREGULARLY AND EXCEEDS THE LIMITS OF HIS AUTHORITY, the law will not protect him in that excess, and if he be killed, the offense will amount to no more than manslaughter. (p. 678.)

HOMICIDE—OFFICER—MOTIVE OF COMPLAINANT.—IF CRIMINAL PROCESS IS REGULAR and legal upon its face, and within the jurisdiction of the magistrate to issue, the officer will be protected in its service, and if he is killed this will be murder, although the complainant had illegal designs in causing it to be issued, and this was known to the officer. (p. 679.)

UPON AN INDICTMENT FOR KILLING AN OFFICER while attempting to serve process, the production of the warrant or writ is all that is required, and the prior proceedings cannot be investigated. (p. 679.)

HOMICIDE.—IF AN ARRESTING OFFICER MEETS WITH RESISTANCE and kills the offender in the struggle he will be justified, and if he is killed it will be murder. (p. 680.)

HOMICIDE.—A RIGHT OF SELF-DEFENSE by an accused may arise where an arresting officer, in executing his process, of his own wrong, commits acts of violence against the accused which are not justified in the execution of his process. (p. 681.)

EVIDENCE—OTHER CRIMES.—On the trial of an accused for crime it is not competent to prove that he committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the indictment. (p. 681.)

EVIDENCE OF OTHER TRANSACTIONS.—IN CASES IN WHICH THE KNOWLEDGE, GOOD FAITH, MOTIVE OR INTENT of the party is material, evidence collateral to the main subject is sometimes admitted, but it is limited to facts which are so connected with the subject in controversy as to make it apparent that the party had a common purpose in both transactions. (pp. 681, 682.)

WITNESS.—ON CROSS-EXAMINATION, A PARTY IS BOUND BY THE ANSWER OF A WITNESS on an immaterial and irrelevant matter, and cannot contradict him by other testimony. (p. 682.)

CRIMINAL TRIAL.—STRIKING OUT EVIDENCE.—In order that no error can be assigned on the reception in a criminal case of illegal evidence, which is subsequently excluded, it should clearly appear that the testimony was so eradicated from the case that its admission could not have injuriously affected the accused. (pp. 682, 683.)

CRIMINAL TRIAL.—EVIDENCE—CHARACTER.—If a prisoner, on his trial, gives evidence that his character is good, the prosecution may by way of reply prove that it was bad, but such evidence must be confined to general reputation, and specific acts cannot be shown. (p. 684.)

George C. Beekman and William J. Leonard, for the plaintiff in error.

John E. Foster, prosecutor of the pleas, for the defendant in error.

⁵⁶⁰ **DEPUE, C. J.** The first assignment of error is directed to the form of the indictment. The indictment contains ⁵⁶¹ two counts: 1. A count in the statutory form prescribed by the forty-fifth section of the act regulating proceedings in criminal cases: Rev., 275; Pamphlet Laws 1898, p. 879, sec. 36. In this count the statutory language was followed, charging that the accused "willfully, feloniously, deliberately, and of his malice aforethought did kill and murder, contrary to the form of the statute in such case made and provided," etc. This form of indictment has been held to be sufficient to charge the crime of murder in the first degree: *Graves v. State*, 45 N. J. L. 203, 347. The second count charges that the accused did "willfully and feloniously kill one James Walsh, he then and there being one of the constables of the said county, and then and there being in the execution of his office and duties as such constable." An indictment in the statutory form prescribed by section 45 of the criminal procedure act (Rev., 275; Pamphlet Laws 1898, p. 879, sec. 36) is a sufficient indictment for the killing of an officer in the execution of his office, and it is not necessary that the indictment should

contain an allegation that the deceased was an officer: *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811. The criticism on the second count is purely formal. Either count is sufficient to sustain the present conviction.

The indictment was found in the court of oyer and terminer of the county of Monmouth, and set down for trial at the term of January, 1900. On the 20th of February, as yet of that term, on the application of the prisoner, the court made an order that a jury be struck for the trial of the indictment at the then present term of the court. In pursuance of this order a jury was struck, and the accused was placed on trial before such jury, and the jury, failing to agree, was discharged by the court. Afterward, at the May term, the court, on the application of the prosecutor, upon due notice to the counsel of the accused, ordered that the rule for a struck jury be vacated. To this order the counsel of the accused excepted, and the case was tried by a jury taken from the general panel summoned for service at that term of the court. By section 18 of the act concerning juries (Rev., 527) it was enacted that the supreme court, the circuit courts, ⁵⁶² the courts of common pleas, court of oyer and terminer, and the courts of general quarter sessions of the peace, respectively, may, on motion in behalf of the state, or of any prosecutor or defendant in any indictment or information in the nature of a quo warranto, or on motion in behalf of the state, or of any plaintiff or defendant, in any action triable by a jury, order a jury to be struck for the trial thereof, etc. Section 19 provides that "if a rule for a struck jury shall be entered in any cause, it shall remain in force until the cause shall be tried, and no common jury shall be summoned therein unless the said rule shall be first vacated by the court," etc. These statutory provisions vest in the court a discretion to order a struck jury and to vacate such an order when it has been made. A party in either a civil or criminal case has no vested or legal right to choose which of the two methods provided at law for the selection of juries for the trial of a civil or criminal case shall be adopted by the court, and therefore has no ground of exception to the order of the court for the selection of jurors in a manner provided by law. Having no legal or vested right to a choice in the manner of convening the jury provided by law, the prisoner was not, by the order of the court discharging the rule for a struck jury, deprived of any right which could, in a legal sense, be considered either a "manifest wrong or injury" within

the purview of section 136 of the act of 1898: Pamphlet Laws, 915.

The accused is a colored man. On the return of the panel of jurors the defendant's counsel challenged the array on the ground that there was no colored man returned on the panel. This challenge was overruled and an exception taken. The contention of the counsel of the plaintiff in error in support of this exception was that the accused had been denied civil rights guaranteed to him by the fourteenth amendment to the constitution of the United States. The language of that amendment pertinent to this subject is contained in section 1, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, ⁵⁶³ liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This provision relates to state action exclusively, and was designed as a protection against acts of the state and not the acts of persons: *Paul v. Virginia*, 8 Wall. 168; *Slaughterhouse Cases*, 16 Wall. 36; *United States v. Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601; *Strauder v. West Virginia*, 100 U. S. 303, 312; *Virginia v. Rives*, 100 U. S. 313, 339; *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. Rep. 904; *Neal v. Delaware*, 103 U. S. 370, 391. A statute of the state which restricts the class of citizens who shall be liable to serve as jurors to white persons would be a violation by the state of this constitutional provision. The statute of this state in relation to juries is not open to such an objection. The qualification of jurors, grand or petit, prescribed by the statute is that every juror shall be a citizen of this state and resident in the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five; and the sheriff is required to select as the panel of jurors for the trial of cases, civil and criminal, from the persons qualified to serve as jurors the names of at least twice as many persons as he shall deem necessary to be summoned as jurors: Rev., 532, 533. "If the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for

the same reason," as was said by Mr. Justice Strong, in *Virginia v. Rives*, 100 U. S. 313, 339, "it can with no propriety be said that the defendant's right is denied by the state and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. . . . The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white⁵⁰⁴ race, and that their race had never been allowed to serve as jurors in the county in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them and the panel summoned to try them may have been impartially selected." In *Johnson v. State*, 59 N. J. L. 271, 536, 540, 37 Atl. 949, 39 Atl. 646, a colored man was indicted for murder. Error was assigned in the exclusion of negroes from jury duty. Nothing appeared except that no colored men were returned on the panel of jurors. It was held by the supreme court and by this court that upon the trial of a colored man the absence of negroes from the panel of jurors is not error in the absence of proof that this exclusion was done designedly, or that such persons were omitted otherwise than in the same way that white citizens not selected were omitted.

There were no colored men returned on this panel of jurors; but the evidence falls far short of showing that they were designedly excluded on account of color by the sheriff in making up his jury list.

Another exception was directed to the admission in evidence of a confession by the prisoner. The killing of the deceased occurred on the 13th of November, about 4 o'clock in the afternoon. The accused immediately fled, and was arrested at South Amboy, about half-past 11 o'clock the same night, by William McDonald, a policeman at South Amboy. It appears from the testimony of McDonald that after he, in connection with Officer Menagh, of South Amboy, had searched the prisoner and put him in jail, either Menagh or his son said to the prisoner, in the presence of those officers, that he had better tell all about it, and that it would be easier for him. McDonald said: "That is the way they worked it on him." A confession procured under such circumstances would be clearly

incompetent as evidence; but no confession made to either of these officers was put in evidence. Their conduct in this respect was reprehensible, but is important only in its effect upon what occurred subsequently. ⁵⁶⁵ Stryker, the chief of police of Red Bank, went to South Amboy to arrest the prisoner. He arrived at the lockup at South Amboy about 4 o'clock in the morning. He hunted up the South Amboy officers, and with them went to the town hall. An offer was made on behalf of the state of the confession made by the prisoner to this witness. On the preliminary examination to ascertain the competency of such evidence the witness testified: "As soon as we got to the foot of the stairs leading down to the cell in the lockup Mr. Bullock jumped up and came to the cell door, and he says, 'Stryker,' or 'Chief,' something of that kind, 'I am glad you have come; I am glad to see you'; and he immediately commenced to talk about what had happened, and I told him right away, I said, 'William, you need not say a word about this unless you are a mind to, and if you do it will be used against you on the trial'; and he says, 'Well, I might as well tell about it; it is all over; I shot him'; and then he commenced to tell about how it all happened."

On the cross-examination of this witness he testified that he did not know that the prisoner had already made a confession; that he warned him not to talk, because he thought it was the officer's duty to give such warning; he always did it. The prisoner was also examined as a witness on this preliminary examination, and testified to what McDonald had said to him. It will be observed that Stryker was not present at any part of the interview between the prisoner and McDonald. The prisoner testified that when Stryker came to the cell he said: "Don't talk, don't talk, don't talk; don't say a word, don't say a word; you are not bound to say a word unless you want to; you are not compelled to say one word unless you want to." And then the prisoner said, "I went to talking to him about some papers that I got him to collect, and he said, 'That has nothing to do with your shooting Walsh.'" After the examination of witnesses on this preliminary examination, the court, under exception, permitted Stryker to testify to the confession made to him by the prisoner.

A confession made by a prisoner charged with crime to an officer in whose custody he is upon that charge can be ⁵⁶⁶ received in evidence only when it appears that the confession was voluntary. By this is meant that the confession must

not be extorted by threats or obtained by any direct or implied promise relating to some benefit to be derived by the prisoner in the criminal prosecution. The ground on which a confession made by the accused under promise of favor or threats of injury is excluded as incompetent is not because any wrong is done to the accused in using them, but because he may be induced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth: *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408.

Stryker's conduct toward the prisoner was in all respects consistent with his duty. He was in no way a participant in the doings of McDonald, Menagh and their associates, or cognizant of what they had done. If the competency of the confession made to Stryker rested only on his conduct toward the prisoner, the confession would undoubtedly have been competent. The question is whether a confession made to him could be received in evidence as a voluntary confession after what had previously occurred between the other officers and the prisoner. It is well settled that where promises or threats have been once used, of such a nature as to render a confession inadmissible, all subsequent admissions of the same or like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume that the delusive hope or fear that influenced the first confession has been effectually dispelled. Where, however, it appears to the satisfaction of the judge that the improper influence was totally done away before the confession was made, the evidence will be received: 1 Taylor on Evidence, sec. 878; *State v. Guild*, 10 N. J. L. 163, 179, 180, 18 Am. Dec. 404. In the case last cited Chief Justice Ewing, commenting on the doctrine laid down by Mr. Starkie, that where a confession has once been induced by threats or promises, all subsequent admissions of the same or of the like facts must be rejected, for they may have resulted from the same influence, says that the reason given for the rule by Mr. Starkie, that the subsequent ⁵⁶⁷ admissions may have resulted from the antecedent influence, is unsound. He adds: "In all sound logic the question must turn, not on the possibility, but the presence of influence; not whether influence once existed, but whether it continued to exert its force. . . . It follows that the true criterion is the actual state of mind of the accused at the time the confessions were made, and the true question for solution whether, at that time,

he was under undue influence of hope or fear. It is readily admitted that the antecedent hopes or fears, or other sources of influence, are to be brought into account and weighed. It may even be conceded that when once a confession under influence is obtained, a presumption arises that a subsequent confession of the same nature flows from the like influence, and that such presumption should be overcome before the confession ought to be given in evidence. But such presumption being satisfactorily repelled, the evidence ought to be received. The rule stated by Starkie, as it goes further, is erroneous." Whether the confession that was received in evidence was made when the mind of the prisoner was laboring under, or was free from, the effect of the previous conduct of McDonald and his associates, presented a question of fact for the trial court. The finding of the trial court on the question of fact will not be set aside unless the evidence on its face does not support the conclusion upon which the trial court based its judgment: *State v. Roesel*, 63 N. J. L. 216, 41 Atl. 408. We think the testimony of Stryker and of the prisoner himself with respect to what occurred between them before any confession was made to Stryker was sufficient to justify the court in its finding that that confession was the voluntary act of the accused.

But where, notwithstanding the finding of the court, there may be a doubt from the whole evidence whether the confession was or was not the voluntary act of the accused, the question should be left to the jury, with a direction that they should reject it if, upon the whole evidence, they were satisfied that it was not his voluntary act: *Roesel v. State*, 63 N. J. L. 216, 41 Atl. 408. The learned judge considered that it was the duty of the court to submit such a question to the jury, for he ⁵⁰⁸ expressly instructed the jury that they must be satisfied that the confession of guilt was the voluntary act of the accused, and not induced by threat, promise, or deception. The court should also have called the attention of the jury upon this subject to the conduct of the officers who had the accused in charge before Stryker came, and the jury should have considered that evidence in connection with the testimony of Stryker on which to determine whether the confession made to the latter officer was the voluntary act of the accused. In deciding upon that proposition any antecedent hopes or fears that might have been engendered by the acts of the other officers were to be brought into account by the court in the first

instance, and by the jury subsequently, and weighed as part of the evidence on the question whether the confession to Stryker was or was not voluntary. No exception was taken to the manner in which this subject was submitted to the jury by the trial court.

The deceased was one of the constables of the county of Monmouth. On the day in question he went to the residence of the prisoner with a writ of execution to him directed, issued by a justice of the peace upon a judgment recovered against the prisoner at the suit of Robert Allen, Jr. He had also a warrant issued by a justice of the peace upon a complaint made by one John E. Stillwell, charging that the prisoner, with force and arms, willfully, maliciously, and designedly, cut and destroyed the cushions, curtains, and spokes of a wagon owned by said Stillwell. This warrant authorized and required the officer to apprehend the prisoner and bring him before the justice issuing the warrant, or some other justice of the peace of said county, to answer to the said complaint. The purpose of the deceased in going to the residence of the prisoner was to execute these writs—the one by a levy on the prisoner's property, the other by taking his person. The prisoner knew that Walsh was a constable, and he was made aware of the object of his visit on that day. By the statute the killing of any magistrate, sheriff, coroner, constable, or other officer of justice, either civil or criminal, in the execution of his office or duty, is ⁵⁶⁹ declared to be murder: Pamphlet Laws 1898, p. 824, sec. 106. The deceased was elected constable in the spring of 1897. His term of office was for three years. By statute constables were required to renew their official bonds annually, and it was provided that if a constable should neglect or refuse so to do within thirty days after the expiration of each yearly term, his position should become vacant, and such vacancy should be filled as required by law: Gen. Stats., p. 849, secs. 14, 16; Pamphlet Laws 1899, p. 429. The deceased took the oath of office and gave a bond as constable in March, 1897. In 1898, he omitted to renew his bond, but in March, 1899, he filed a renewal bond, which complied with the statute. These bonds were accepted by the township officers. It is contended that the deceased, having failed to renew his bond in 1898, his office as constable became vacated, and could not be restored to him by giving a bond in 1899. The constitution of this state provides that sheriffs and coroners shall hold their offices for three years, and that sheriffs should annually renew

their bonds. By statute the sheriff-elect or the sheriff for the time being is required to enter into bond on the first Tuesday after the annual election of members of general assembly, with sufficient sureties and in such sum as the court of common pleas might order, etc. It also provides "that if any sheriff for the time being of any county shall neglect, refuse, or be unable to give bond with sureties as aforesaid, agreeably to the directions of this act, at the time therein limited, the office of such sheriff shall immediately expire and be deemed and taken to be vacant, and if such sheriff shall thereafter presume to execute the office of sheriff, then all such his acts and proceedings done under color of office shall be absolutely void, and he shall for such offense be liable to be indicted for a misdemeanor," etc. The supreme court held that this legislation did not per se vacate the office of the sheriff on his failure to renew his bond within the specified time, and that such sheriff was an officer with a defeasible title until the judgment of forfeiture was pronounced in due form: Gen. Stats., 3112; *Clark v. Ennis*, 45 N. J. L. 69. The term for which the deceased was ⁵⁷⁰ elected constable was three years. His continuance in office was recognized by the public authorities, and his official character was shown by such evidence as is uniformly regarded as sufficient proof of official position. The court of oyer and terminer, on this issue, had no authority to institute an inquiry as to whether his office had become vacant and pronounce a judgment of forfeiture.

It is contended by the plaintiff in error that notwithstanding the deceased was an officer and was killed while in the execution of the duties of his office, and although the statute prescribes that the killing of such officer, under those circumstances, is murder, yet that, under the facts disclosed in this case, the accused should have been convicted only of manslaughter. The prisoner also sought to justify the killing on the ground that it was done in self-defense. The learned judge, in his instructions to the jury, declared his opinion that under no view of any evidence in the cause could the killing have been merely manslaughter.

"Ministers of justice while in the execution of their offices are under the peculiar protection of the law. This special protection is founded in great wisdom and equity, and in every principle of political justice; for without it, the public tranquility cannot possibly be maintained, or private property secured; nor, in the ordinary course of things, will offenders of

any kind be amenable to justice. And for these reasons the killing of officers so employed hath been deemed murder of malice prepense, as being an outrage willfully committed in defiance of the justice of the kingdom": Foster's Criminal Law, 308; Mackalley's Case, 9 Coke, 65. By statute the killing of an officer of justice in the execution of his office or duty is made murder, which will be murder of the first or second degree, according to circumstances.

Where an officer, in executing his office, proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess, and if he be killed, the offense will amount to no more than manslaughter in the person whose liberty is so invaded: 3 Russell on Crimes, 109. But it will be observed on an examination of the authorities that ⁵⁷¹ what is meant by proceeding irregularly or exceeding the limits of his authority concerns the validity and character of the process in the hands of the officer. Mr. Russell adds that the officer should be careful, therefore, to execute process only within the jurisdiction of the court from whence it issues, and if it be executed out of such jurisdiction, the killing of the officer attempting to execute it will be only manslaughter. The officer must also be careful not to make the arrest on a Sunday, except in cases of treason, felony, or breach of the peace, as in all other cases an arrest on that day will be the same as if done without authority. To the same effect was the instruction of Mr. Justice Lippincott to the jury in the case of State v. Brown, which was an indictment for killing an officer in the execution of his duties, and that instruction was approved by this court: Brown v. State, 62 N. J. L. 666, 713, 714, 42 Atl. 811.

Testimony was given by the prisoner complaining of oppressive conduct on the part of Allen and of Stillwell; that the latter had previously procured the search of his premises without justification. This evidence was incompetent. In the service of criminal process an officer is not to be influenced or governed by the purposes, designs, or objects of complainants, but by his precept; and if the process be regular and legal upon its face, and within the jurisdiction of the magistrate to issue, the officer will be protected in its service, and if he be killed in the execution of it this will be murder, although the complainant had illegal designs in causing it to be issued, and although the officer knew that the warrant had been procured by the complainant to accomplish improper and

illegal objects: *State v. Weed*, 1 Fost. 262; 1 Lead. Cr. Cas. 202; 7 Bacon's Abridgment, 198, tit. "Murder and Homicide"; Foster's Criminal Law, 136, 312. Upon an indictment for killing an officer while attempting to serve process the production of the warrant or writ is all that is required, and the prior proceedings cannot be investigated: Roscoe's Criminal Evidence, 790, 791; 1 East P. C. 309, sec. 78. The controversy of Allen and Stillwell with the prisoner and their treatment of him were ⁵⁷² matters that did not concern the deceased; it was his duty to execute the writ.

The process in the hands of the deceased for the arrest of the prisoner was issued by competent authority, and was in all respects regular on its face. The deceased was in the act of executing the process by arresting the prisoner within the jurisdiction of the magistrate by whom it was issued. He was killed when he was "in the execution of his office or duty." If the act of killing be not excused or justified, so as to entitle the accused to an acquittal, the conviction must be of murder; for the statute expressly declares that if any person shall kill any of the officers of justice named "in the execution of his office or duty, then such person or persons so killing as aforesaid shall be guilty of murder." If the act of killing be justified, then an accused would be entitled to an acquittal. The accused sought to justify the act of killing on the ground of self-defense.

In disposing of the justification set up for the killing of the deceased, the primary consideration concerns the rights and duties of the parties respectively. It was the duty of the deceased to execute his process by taking the body of the accused into custody and to hold him in custody to answer the command of the writ, and it was the duty of the accused to submit to such arrest and custody. If, in making an arrest, the officer meets with resistance, he is not obliged to retreat or desist. Judge Foster states the doctrine as to arrests in cases of misdemeanors and breaches of the peace, as well as in cases of felonies, in these words: "The person having authority to arrest or imprison may repel force with force, and if death ensueth in the struggle, he will be justified. This is founded in reason and public utility. For few men would quietly submit to an arrest if in every case of resistance the party empowered to arrest was obliged to desist and leave the business undone": Fost. 270, sec. 2; 1 Hale's Pleas of the Crown, 481. "If the officer meet with resistance and kill the

offender in the struggle, he will be justified, and if he be killed, it will be murder": 1 East, p. 302, c. 5, sec. 70; 2 Roscoe's Criminal Evidence, 229; 3 Russell on Crimes, 73. It must not, however, be assumed that an officer ⁵⁷³ in the execution of process would be protected in acts of violence upon the prisoner committed of his own wrong and not warranted in the performance of his duty. The conditions under which an officer is deprived of the protection of his process are those in which in executing it he, of his own wrong, commits acts of violence against the accused which are not justified in the execution of his process. Under such circumstances a right of self-defense by the accused may arise. If in any case it be made to appear that the occasion for self-defense on the part of an accused has arisen, then the question will be whether that defense has been entered upon and conducted in accordance with the law as laid down in *Brown v. State*. Even if the prisoner had a right of self-defense, it would not follow that he would be entitled to an acquittal. Under such circumstances the problem for solution, upon which the result of the trial would be determined, would be whether the act of killing the officer was done in the lawful exercise of that right of self-defense. The prisoner fired five shots from his pistol in rapid succession, three of which took effect upon the body of the deceased, causing instant death. This is the act done by the prisoner which must be justified in order to an acquittal. Whether the prisoner was justified in resorting to self-defense at all, and whether the acts done by him were lawful in the prosecution of his defense, must be determined by the legal principles adjudicated in *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811.

It is not proposed to discuss the evidence on this subject. The prisoner was a competent witness in his own behalf; but in giving effect to his testimony the jury should have been reminded of the momentous interest he had in the result of the trial as affecting his credibility.

The instruction of the trial court in presenting the case, on the theory that the accused, if convicted, should be convicted of murder, was correct. The argument of counsel based upon the omission of the words "and be thereof convicted" in the reenactment of section 70 (Rev., 239) in the act of 1898 (page 825, section 109), does not require consideration. The statute prescribes the penalty for murder of the ⁵⁷⁴ first degree and for murder of the second degree, and on a conviction by the

jury of an offense of either class, the statute fixes the sentence to be pronounced.

Thus far in the examination of the record in this case no exception taken by the accused is found that would call for a reversal.

I now come to the exception taken to the admission of testimony given by Peter B. Campbell. Campbell testified that when the prisoner was a boy of seventeen or eighteen years of age he worked for him for a few days. (The prisoner was thirty-six at the time of the trial.) He further testified: "He worked for me three or four days, and he didn't come back to his work and I done it myself, and he came in the stall and wanted to know what I was doing in there; I told him I had a right in there, and he wanted me to go out, and I didn't go, and he pulled the door and came at me with a razor, and I struck him with a fork and broke two of his teeth off in front, and he has got them there yet—that is, just a little scale off; and he came at me a second time, and I knocked him down, and a man came in and picked up the razor." Then, as appears by the record, the prisoner opened his mouth so that the jury might look at his teeth, and it appeared that one tooth in the lower jaw was missing. The witness then testified that he did not remember whether he broke one or two teeth, but he knew it was on one side or the other of his mouth. The prisoner was called to rebut this testimony, and testified that he never worked for Campbell in his life, and also as to the manner in which he lost the tooth from the lower part of his jaw. Campbell's testimony was received under exception. It was clearly incompetent. On the trial of an accused for a crime it is not competent to prove that he committed other crimes of a like nature for the purpose of showing that the accused would be likely to commit the crime charged in the indictment: *Clark v. State*, 47 N. J. L. 556, 4 Atl. 327; *Leonard v. State*, 60 N. J. L. 8, 41 Atl. 561; *State v. Raymond*, 53 N. J. L. 260, 265, 21 Atl. 328; *Meyer v. State*, 59 N. J. L. 310, 36 Atl. 483; *Parks v. State*, 59 N. J. L. 573, 36 Atl. 935; *Ryan v. State*, 60 N. J. L. 552, 556, 38 Atl. 672; *State v. Sprague*, 64 N. J. L. 419, 45 Atl. 788. There is a class of cases in which the knowledge,⁵⁷⁵ good faith, motive, or intent of a party is material, on which evidence collateral to the main subject is sometimes admitted; but the competency of such evidence is limited to facts

which are so connected with the subject in controversy as to make it apparent that the party had a common purpose in both transactions: 1 Taylor on Evidence, secs. 327, 338, 348; 11 Am. & Eng. Ency. of Law, 2d ed., 510, 514, and cases cited in the notes; Jordan v. Osgood, 109 Mass. 457, 463, 12 Am. Rep. 731; Cary v. Hotailing, 1 Hill, 311, 316, 37 Am. Dec. 323; People v. Dimick, 107 N. Y. 13, 32, 14 N. E. 178; King v. Ellis, 6 Barn. & C. 145. But on the trial of a criminal charge it is not relevant to show that the defendant has committed other similar crimes which are not connected in any way with the one in question: 11 Am. & Eng. Ency. of Law, 2d ed., 513; Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. Rep. 292; Commonwealth v. Jackson, 132 Mass. 16; People v. Gibbs, 93 N. Y. 470, 473. The transaction testified to by Campbell was wholly extraneous, and had no connection whatever with the charge, for which the prisoner was on trial.

The only argument presented by the counsel of the state in support of the legality of the evidence of Campbell was that it was made competent by the cross-examination of the accused. On the examination of the accused by his counsel he was asked the question whether he had ever had trouble with anyone, to which he answered that he had never had trouble with anyone. On cross-examination counsel of the state asked him whether he did not have a dispute with Campbell, and draw a razor on him in the stall and attack him with a pitchfork. Objection was taken to this testimony, and the objection was overruled. This evidence was incompetent, but if at all competent on cross-examination, being irrelevant and immaterial, the state was bound by the answer of the witness, and it laid no foundation for the right to contradict him in that respect by the testimony of Campbell: State v. Sprague, 64 N. J. L. 419, 45 Atl. 788; Bergen Neck Ry. Co. v. Point Breeze Ferry Co., 57 N. J. L. 163, 30 Atl. 584.

Where evidence which is illegal is received by the court in the progress of the trial, it is competent for the court subsequently to exclude such illegal testimony. In such a case no ⁵⁷⁶ error could be assigned on the reception of the testimony. But the admission of the evidence being error, it must clearly appear that the testimony illegally admitted was so eradicated from the case that its admission could not have injuriously affected the accused: Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. Rep. 295, 567. The manner in which the evidence of

Campbell was put in and the character of his testimony were calculated to impress upon the minds of the jurors a conviction of the natural propensity of the prisoner to resort to extreme violence on slight provocation. To have removed the effect of this evidence it would, at least, have been necessary to have expunged it from the record formally and emphatically before the testimony was closed and the summing up of counsel was commenced. No order overruling the testimony was made, and it may be assumed that it was commented upon by counsel in their arguments before the jury. In the course of the delivery of the charge the judge, adverting to this testimony, used this language: "I will digress to say a word about some testimony introduced in the case, tending to show violence on his [the prisoner's] part on other occasions. I had some hesitation in admitting the testimony of the witness Campbell, but I judged it to be legal, because of the prisoner's own statement that he had never had any trouble before this. On reflection, after considering the evidence of Campbell, I think it is my duty to tell you to disregard that, because it seems to me too uncertain on the question of identity to be of value. It would not be evidential simply to overcome proof of reputation." It will be observed from this language that in the charge the judge did not instruct the jury to disregard the evidence because it was illegal, but because it was too uncertain on the question of identity to be of value. It is quite possible that in the minds of the jurors the question of identity may have been established. We think that, notwithstanding the charge of the judge on this subject, the evidence of Campbell may have had, and probably did have, an influence on the minds of the jury in rendering its verdict.

Nor was the testimony of Campbell competent or relevant ⁵⁷⁷ on the issue of the character of the accused. If a prisoner, on his trial, gives evidence that his character is good, it is open for the prosecutor by way of reply to prove that the prisoner's character is bad; but evidence of this character must be confined to general reputation, and particular acts or specific facts are not admissible, either as original evidence or as evidence by way of rebuttal: 5 Am. & Eng. Ency. of Law, 2d ed., 875, and cases cited in notes. Where a person accused of a criminal offense produces evidence to show that his general reputation is good, it is not competent for the government in reply to put in evidence particular facts: Com-

monwealth v. O'Brien, 119 Mass. 342, 20 Am. Rep. 325; Commonwealth v. Hardy, 2 Mass. 317; Regina v. Rowton, 10 Cox C. C. 25; 2 Lead. Cr. Cas. 333; 3 Russell on Crimes, 426.

For the admission of the testimony of Campbell we think the judgment should be reversed.

The Question Whether a Confession was voluntary arose also in State v. Hill, 65 N. J. L. 626, 47 Atl. 814, and the principal case was expressly approved. The principal inquiry was whether the confession was made by the prisoner when he was not competent to know of what he was speaking, and the court said: "When a confession is offered by the state in a criminal case, it is the right of the counsel of the prisoner, before it is admitted, to cross-examine the witness who proposes to testify to it as to the circumstances surrounding the making of it, and the defense may also call, at the same time, independent witnesses and examine them, going thoroughly into the whole matter as to how the confession came to be made, the parties present, the physical condition and state of mind of the prisoner at the time it was made, and then the court, with all these facts before it, is to pass upon its admission.

"In this case no offer was made to show the condition of mind or body alleged to have existed in the prisoner at the time the confession was made. It is too late to raise such a question on error in this court, when no attempt was made in the court below to prove facts which, if they existed, must have then been within the knowledge and ability of the prisoner to establish. The law always presumes a man to be conscious and sane, and if the contrary exists, thereby defeating the natural presumption, it must be shown by the party who alleges it. The condition, mental and physical, of a prisoner at the time of the alleged confession, if shown to the judge, may very materially affect his decision upon the question of its admission and the prisoner has the right to have it all disclosed before the court passes upon it; but it is not essential to the state's case for it to bring out such facts in the first instance.

"As to the confession admitted in this case and here under review, we think that while the preliminary testimony of the circumstances surrounding the making of it may not have been shown as fully by the state as should always be exacted by the court before admitting a confession of the prisoner in a homicide case, still it discloses, by the testimony of the officer himself, unshaken by any cross-examination of the prisoner's counsel, and uncontradicted by any other evidence, that he said to the prisoner before he made the statement to him: 'Well, I am an officer; you don't have to tell me anything if you don't want to; what you tell me the court might ask me.' No promise was held out by the officer, nor was any threat made; the confession seems to have been voluntary, and that

is all that is required to be proven by the state to lay the foundation for its admission.

"It is the safer rule for the court, in cases where the life of a prisoner is at stake, to require a complete disclosure of all the facts and circumstances surrounding the confession, and to call upon the counsel of the state and of the prisoner to give to the court the fullest information possible to aid the court in its decision upon the admission of the testimony, but no adjudication in this state so requires as a preliminary requisite to its admission."

An Indictment for a Statutory Offense is generally sufficient if it describes the offense in the words of the statute: *Dickhaut v. State*, 85 Md. 451, 60 Am. St. Rep. 332, 37 Atl. 21; *State v. Williamson*, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022; *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303; monographic note to *State v. Campbell*, 94 Am. Dec. 253-258. But see *State v. Howard*, 66 Minn. 309, 61 Am. St. Rep. 403, 68 N. W. 1096.

Resisting Arrest.—An officer is protected in making an arrest under a process regular on its face. And the one arrested has no right to resist. It is otherwise, however, where an unlawful arrest is attempted without a warrant. Such an arrest may be resisted even to taking the officer's life: See the monographic note to *State v. Evans*, 84 Am. St. Rep. 697-702. And even in case of a legal arrest, if the power to arrest is exercised in such a wanton and menacing manner as to threaten the party with loss of life or great bodily harm, he may kill in self-defense: See the monographic note to *State v. Sumner*, 74 Am. St. Rep. 726.

Confessions, to be Admissible, must be voluntary: *Bradford v. State*, 104 Ala. 68, 53 Am. St. Rep. 24, 16 South. 107; *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51. Artifice, however, in obtaining a confession does not render it inadmissible: *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51. Though confessions obtained by false statements of the prosecutor or by fraud are not admissible: *Cook v. State*, 32 Tex. Cr. Rep. 27, 40 Am. St. Rep. 758, 22 S. W. 23. Nor are they admissible where there is reasonable ground to believe they were induced by hope or fear: *Green v. State*, 88 Ga. 516, 30 Am. St. Rep. 167, 15 S. E. 10. When the influence applied to obtain a confession is such as to make the prisoner believe that his condition will be bettered by making a confession, true or false, this excludes the confession: *Searcy v. State*, 28 Tex. App. 513, 19 Am. St. Rep. 851, 13 S. W. 782; *Green v. State*, 88 Ga. 516, 30 Am. St. Rep. 167, 15 S. E. 10. And a promise by an officer to a prisoner that if he will confess, "he will do what he can for him" renders the confession inadmissible: *Searcy v. State*, 28 Tex. App. 513, 19 Am. St. Rep. 851, 13 S. W. 782. Threats and intimidation by officer inducing a confession excludes it: *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557, 54 N. E. 51. It is the province of the court to determine whether a confession was voluntary in a case free from doubt, but if there is a conflict of testimony or room for doubt, the court should submit the question to the jury with proper instructions: *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539. But see *Ellis v. State*, 65 Miss. 44, 7 Am. St. Rep. 634, 30 South. 188. See, further, the extended note to *Daniels v. State*, 6 Am. St. Rep. 242-251, on the admissibility in evidence of confessions.

Constitutional Law.—In the eyes of the law a white and a colored person are equal, and neither has any right to insist that a person of his race or color shall be on the jury by which he is tried for a crime, or when he is otherwise a party to an action or proceeding: See the monographic note to *State v. Goodwill*, 25 Am. St. Rep. 878.

KOCHER v. SUPREME COUNCIL CATHOLIC BENEVOLENT LEGION.

[65 N. J. L. 649, 48 Atl. 544.]

THE LAW OF AGENCY APPLIES TO OFFICERS OF CORPORATIONS. Hence, if any officer of a corporation is allowed to exercise general authority in respect to the business of the corporation for a considerable time, the corporation is bound by his acts in the same manner as if the authority was expressly granted. (p. 690.)

AGENCY.—THE RULE THAT CORPORATIONS ARE BOUND BY THE ACTS OF THEIR OFFICERS who are held out as having power to perform such acts applies only to those who deal in good faith with the officers, and who do not know, or are not bound to know, the limitations of their power. (p. 690.)

PERSONS ENTERING MUTUAL BENEFIT SOCIETIES are presumed to know the terms of the charter and by-laws under which they are organized. (p. 691.)

OFFICERS OF MUTUAL BENEFIT SOCIETIES cannot dispense with the terms and conditions of the association charter and by-laws, unless expressly authorized to do so. (p. 691.)

THE OFFICERS OF A MUTUAL BENEFIT SOCIETY HAVE NO POWER TO WAIVE BY-LAWS relating to the substance of the contract between an individual member and his associates in their corporate capacity. (p. 691.)

THE CONSTITUTION IS THE FUNDAMENTAL LAW OF A MUTUAL BENEFIT SOCIETY to which all who come within its operation must conform. (p. 691.)

MUTUAL BENEFIT SOCIETIES — CUSTOM.—Isolated instances are insufficient to prove a custom, and cannot be shown to overcome or change the express provisions of a contract of insurance. (p. 692.)

Clarence D. Meyer, for the plaintiff in error.

Samuel F. Bigelow, for the defendant in error.

650 **HENDRICKSON, J.** This suit was brought by Mary E. Kocher, the plaintiff below, against the defendant, an incorporated benevolent association located at Brooklyn, New York, to recover one thousand dollars claimed to be due her as the beneficiary named in a benefit certificate dated October 29,

1894, issued by the association to her husband, George J. Kocher. He was a member and a second-grade contributor to the benefit fund of St. Brendan Council, No. 446, Catholic Benevolent Legion, located at Newark, New Jersey, a subordinate council of the defendant association. And this certificate was issued to said holder upon evidence received that he was a second-grade contributor to the benefit fund of said legion, and upon condition that the statements in his application for membership were true, and that he would strictly comply with the laws, rules, and regulations of the legion.

The controversy arises over the ruling of the trial judge at the Essex circuit in admitting the evidence of the plaintiff to prove alleged parol declarations of the supreme secretary of the defendant, the effect of which was held to be a waiver of the payments of the assessments due the benefit fund as required by the constitution and by the by-laws of the defendant association. This feature of the proofs arose in this way: The husband disappeared from the city of Newark on August 27 1894, and did not return until October 16, 1896. He was sick when he returned unexpectedly, and died February 20, 1897. He was in good standing up to the day he left, and thereafter his wife, the beneficiary, paid his assessments, which came due on the first and fifteenth of each month, down to February 15, 1895. She did not pay the assesment—No. 232—⁶⁵¹ which came due on March 1st succeeding, but the local council advanced that for the member.

A subordinate council was authorized, by the laws of the legion, to authorize the payment of a member's assessment, as a loan or gift, from its general fund, if actually paid in cash to the collector within the time prescribed for payment. The next assessment—No. 233—which fell due on March 15, 1895, was not paid.

One of the laws of the legion enacted that any member failing to pay a regular assessment on or before the first and fifteenth day of each calendar month, as therein provided, should stand suspended. There was a subsequent provision that a member of the legion who was suspended, applying to be reinstated, must pay the full amount of arrears for dues and fines, all assessments occurring on or before the date of the suspension, and all dues and assessments or other liabilities which would have been charged against him during the period of sixty days after his suspension. A tender was made of the unpaid assessments after the husband returned, which was

refused. In addition, he must also furnish the council a certificate of the medical examiner showing his physical condition and that he is a proper subject for membership. This he did not do.

The learned trial judge seems to have rightly assumed that the suspension followed a default in the payment of the assessment, when due, *ex proprio vigore*, without such suspension being evidenced by any act of the local or supreme council; and that, by such suspension, the member forfeits his rights under his benefit certificate. This is the true rule: *Catoir v. American Life Ins. etc. Co.*, 33 N. J. L. 487; *Rood v. Railway Passenger etc. Assn.*, 31 Fed. 62; *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq. 167.

The by-law of the supreme council, which fixes the dates of payments of the assessments, adds that no further notice shall be necessary. Under such a provision of the by-laws notice of the nonpayment was not necessary to give effect ⁶⁵² to the suspension and forfeiture: *Borgraefe v. Knights of Honor*, 22 Mo. App. 127, 142; *Illinois Masonic Benevolent Society v. Baldwin*, 86 Ill. 479; *Madeira v. Merchants' Exchange etc. Soc.*, 16 Fed. 749.

The trial judge also charged the jury that, under the proofs, he would have no hesitation in directing a verdict for the defendant but for the plaintiff's evidence of the parol declarations of the supreme secretary above alluded to. This evidence was admitted over the defendant's objection, and the legality of the ruling is the only question we need consider. This evidence was to the effect that the plaintiff had received information, in the fall of 1894, which led her to think that her husband was dead, but she could not make the required proof. She continued paying the assessments until February 13, 1895, when she paid the assessment that fell due on the fifteenth of that month. She spoke to the collector of the local council as to whether she should continue paying the assessments and dues, and what she should do about it. Getting no satisfaction from him, she testified that she visited the supreme secretary of the legion, at Brooklyn, on one or two different occasions, and that, in answer to her inquiries, the latter told her not to bother about either assessments or dues until such time as she found out whether her husband was dead or alive, and that, if at any time she found out that he was alive, she could come to them and have him in full benefit

by paying back dues and assessments, and that he further told her that the suspension did not amount to anything.

Whether these conversations occurred before or after March 15, 1895, does not clearly appear. They were somewhere near that date. But the supreme secretary, when called by the defendant, denied making statements of the character attributed to him, or waiving in any way the payments of assessments when due.

It will be observed that the effect of the judge's ruling was to permit the alleged declarations of the supreme secretary, if ~~653~~ proved, to cause the by-laws of the legion to be waived and set aside in the respect mentioned.

In the constitution of the legion it is declared that the constitution of the supreme council and the laws governing the benefit fund shall not be altered or amended except by a three-fourths vote of the members present at a regular meeting of the supreme council, etc. The powers and duties of the supreme secretary, as defined in the constitution and by-laws, are largely clerical, connected with the meetings of the supreme council, conducting its correspondence, etc., but he is nowhere clothed with power to waive or suspend any of the provisions of the constitution and laws of the legion.

The trial judge seems to have reached the conclusion that this officer had the power to waive the provisions of the by-laws in question, on the ground, as the judge said he thought, that, under the by-laws, such officer was the general manager of the corporation, and that he was the man who represented the corporation. But, supposing he was such general manager, it does not follow, for that reason alone, that he could, under the circumstances of the case, waive the provisions of the constitution and by-laws in question.

It is true that the law of agency applies to officers of corporations, and that if any officer of a corporation is allowed to exercise general authority in respect to the business of the corporation, or a particular branch of it, for a considerable time—or, in other words, if he is held out to the world as having authority in the premises—the corporation is bound by his acts in the same manner as if the authority was expressly granted: 17 Am. & Eng. Ency. of Law, 135. But this immunity is extended to those only dealing in good faith with such officers, and who do not know, or are not bound to know, the limitations of their power by the provisions of the com-

pany's charter: 17 Am. & Eng. Ency. of Law, 133, 138; *Adriance v. Roome*, 52 Barb. 399.

In the present case the plaintiff is not in the attitude of one dealing with the corporation in good faith and without notice. As beneficiary she had no vested interest, even in the ⁶⁵⁴ benefit certificate. A by-law authorized the holder of it to change the beneficiary at any time. She was recognized, perhaps, as an agent of her husband in paying the assessment, and she could occupy a no more favorable position than he in dealing with the corporation. And he, having been a charter member and former president of the subordinate council, must be held to have been acquainted with the provisions of the constitution and by-laws of the legion. Besides, it is a general principle that persons entering mutual companies are presumed to know the terms of the charter and by-laws under which they are organized. Nor can the officers of such associations dispense with the terms and conditions of such charter and by-laws unless they are expressly authorized to do so: *Belleville Mutual Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333, 342; *Hale v. Mechanics' Mut. Ins. Co.*, 6 Gray, 169, 66 Am. Dec. 410; *Brewer v. Chelsea Mut. Ins. Co.*, 14 Gray, 203; *Miller v. Hillsborough Fire Assn.*, 42 N. J. Eq. 459, 7 Atl. 895; *Miller v. Hillsborough Fire Assn.*, 44 N. J. Eq. 224, 10 Atl. 106, 14 Atl. 278.

The officers of a mutual association have no power to waive by-laws relating to the substance of the contract between an individual member and his associates in their corporate capacity: 3 Am. & Eng. Ency. of Law, 2d ed., 1069; *Niblack on Benefit Societies and Accident Insurance*, 2d ed., 195; *Mulrey v. Shawmut Mut. Fire Ins. Co.*, 4 Allen, 116, 81 Am. Dec. 689, *Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen, 329; *McCoy v. Roman Catholic Ins. Co.*, 152 Mass. 272, 25 N. E. 289; *Lyon v. Supreme Assembly*, 153 Mass. 83, 26 N. E. 236. Again, the constitution is the fundamental law of these benevolent associations, to which all who come within its operation must conform: *Morawetz on Corporations*, 2d ed., 494; *Niblack on Benefit Societies and Accident Insurance*, 2d ed., sec. 14.

There is a class of cases which may, perhaps, form an exception to the application of the general principles above laid down, and that is where a course of dealing by officers and agents of a corporation, at variance with the strict limitation

of duty, has been established by proof of the usage, which has been permitted to grow up in the transaction of its business, and of the acquiescence of its managing officers charged with ⁶⁵⁵ the duty to provide and control the company's business; 17 *Am. & Eng. Ency. of Law*, 139; Niblack on Benefit Societies and Accident Insurance, 2d ed., 192. But whether the proof of such usage or apparent authority would be sufficient to justify the evidence of waiver offered in this case, it is unnecessary to decide.

The defendant association had its supreme council, which was its legislative body, and the president of the supreme council was an officer of large powers, but subordinate to the council. It is needless, I think, in this case to go into the powers and duties of the several officers of the legion and endeavor to settle definitely who might be properly said to be the managing officer of the corporation. For the case is absolutely barren of proof that there was any usage or practice of the association that permitted or sanctioned any previous acts of the supreme secretary or other officers in waiving the payment of assessments or dues from members of the legion under any circumstances. Isolated instances of forfeiture are insufficient to prove a custom, and cannot be shown to overcome or change the express provisions of the contract of insurance: Niblack on Benefit Societies and Accident Insurance, 2d ed., 536.

There is no proof that the supreme secretary or other officers had ever, on any previous occasions, waived these or any other provisions of the constitution and by-laws of the legion. So that it is impossible to uphold such a radical departure from duty, as alleged, on the part of the supreme secretary, upon the theory of usage or apparent authority.

I think it plain that the refusal to overrule this testimony as to the parol declarations of the supreme secretary was error, and that for this reason the judgment below should be reversed.

Benefit Society.—The charter, constitution, and by-laws of a mutual benefit society form part of the contract with its members: *Union Fraternal League v. Walton*, 109 Ga. 1, 77 Am. St. Rep. 350, 34 S. E. 317; *Supreme Lodge etc. v. Stein*, 75 Miss. 107, 65 Am. St. Rep. 589, 21 South. 559; *Sourwine v. Supreme Lodge etc.*, 12 Ind. App. 447, 54 Am. St. Rep. 352, 40 N. E. 646; *Condon v. Mutual Reserve Assn.*, 89 Md. 99, 73 Am. St. Rep. 169, 42 Atl. 944. Of these the member must take notice and be governed thereby: See the monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 555. Consult, also, *In re Assignment Mutual etc. Ins. Co.*, 107

Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868. The power of the association or of its officers to waive provisions of the by-laws or constitution is considered in the extended note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 559; *Burlington Voluntary Relief Dept. v. White*, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747.

A Corporation is Bound by the Acts of an officer if it allows him to so conduct himself as to induce those dealing with him in good faith to believe he possesses certain powers: *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

COMMONWEALTH v. CLARK.

[195 Pa. St. 634, 46 Atl. 286.]

CONSTITUTIONAL LAW—LICENSE TAX—CLASSIFICATION OF MERCHANTS.—A municipal ordinance classifying wholesale and retail merchants for the purposes of a municipal license tax is valid, and does not violate any constitutional provision, either national or state, and under such classification different rates of tax may be imposed upon the several classes as established by such ordinance. (pp. 694, 702.)

Prosecution founded upon an ordinance of the city of Titusville for failure to take out a license. The defendant was found guilty in the justice's court and thereupon appealed to the common pleas, which affirmed the judgment. Its opinion was as follows:

634 THOMAS, P. J. By agreement of counsel this case is tried upon a case stated for the opinion of the court in the nature of a special verdict.

The city of Titusville is, and has been since 1875, a city of the third class, and on June 25, 1888, the legislative body of the said city duly and regularly passed, and the mayor of said city duly approved, of the ordinance by virtue of which the license tax under consideration is imposed.

The ordinance was evidently enacted by virtue of the unconstitutional act of May 24, 1887, but the municipal actions had under and based upon said act were legally ratified by the act of May 13, 1889: *Melick v. Williamsport*, 162 Pa. St. 408, 29 Atl. 917; *City of Chester v. Pennell*, 169 Pa. St. 300, 32 Atl. 408.

⁶³⁵ Nor is there any contention of the parties upon this point, but defendant denies the legality of the ordinance upon two grounds, viz.: 1. Because certain of the merchants and business men of Titusville are exempt from any taxation whatever; and 2. The tax imposed is not uniform, and the classification adopted is prohibited by the fourteenth amendment to the federal constitution.

The tax imposed being authorized by clause 4, section 3 of article 5 of the act of May 23, 1889, is for general revenue purposes, and by virtue of the general taxing powers of the municipality, and not through or by virtue of its police powers: *Williamsport v. Wenner*, 172 Pa. St. 173, 32 Atl. 544; *Oil City v. Oil City Trust Co.*, 151 Pa. St. 459, 31 Am. St. Rep. 770, 25 Atl. 124.

Section 3 of the ordinance classifies those who make and effect annual sales of divers amounts. Section 4 provides "that contractors whose business and real estate agents whose sales exceed one thousand dollars per annum shall be classified and rated as provided for in section 3 of this ordinance, and shall pay a license according to said section."

By section 3 no exemption is allowed to persons doing an annual business of less than one thousand dollars, and as contractors and real estate agents are otherwise classified with the persons making and effecting sales, to thus exempt a part of the class doing an annual business of less than one thousand dollars, and impose a tax upon others belonging to the same class is clearly violative of sections 1 and 2, article 9 of the constitution of this commonwealth: *Commonwealth v. Germania Brewing Co.*, 145 Pa. St. 83, 22 Atl. 240; *Commonwealth v. Sharon Coal Co.*, 164 Pa. St. 304, 30 Atl. 127, 128; *Fox and Wife's Appeal*, 112 Pa. St. 337, 4 Atl. 149; *Pittsburg v. Coyle*, 165 Pa. St. 61, 30 Atl. 452.

This exemption is class legislation, which is forbidden by the constitution, and not in any way or under any guise to be tolerated. This portion of the ordinance must fall, but this defect alone does not render the entire ordinance void.

As was said by our supreme court in *Fox and Wife's Appeal*, 112 Pa. St. 337, 4 Atl. 149, in declaring unconstitutional that part of the act of 1885 which excepted from taxation notes or bills for work or labor done, "but for this vice we are not required to declare the act of 1885 void. The second section of article 9 of the constitution provides: 'All laws exempting property from taxation, other than the property above enu-

merated, shall be void.' ⁶³⁶ The exemption of 'notes or bills for work or labor done' is void under this provision and drops out of the act of 1885. The exception falls but the act stands. It will be the duty of the assessors to assess and return such bills or notes the same as other moneyed securities in the hands of individuals."

Section 16 of said ordinance provides "that no manufacturer who is a citizen of the city of Titusville shall be considered a dealer or vender of merchandise within the spirit of this ordinance unless he sells goods not of his own manufacture."

We think that distinguishing such persons from the ones classified in said ordinance is a valid exercise of the power of the legislative body of said city.

We can readily understand how and why manufacturers who regularly have taxable capital invested in a plant and whose chief item of profit consists in converting the raw material into the finished product should not be classified with venders of merchandise whose chief capital consists of their stock in trade, and whose profits are derived from selling at retail at an advanced price over that of the wholesale purchaser.

If the entire classification in this ordinance rested on as good, valid and reasonable grounds as does this distinction or classification, if we may so term it, we would see little to complain of.

Whether or not the merchant tailors, tinsmiths or tombstone dealers referred to in the case stated come under the manufacturers provided for by section 16 need not now be decided, nor need we decide in this action the rights of defendant against the city for a failure of its officials to enforce the ordinance against others who may properly come under its provisions. Even were the said sixteenth section unconstitutional and void, we do not think that would invalidate the entire ordinance: See Fox and Wife's Appeal, 112 Pa. St. 337, 4 Atl. 149.

Let us, then, examine the second objection to the validity of this ordinance, and, bearing in mind that it is a tax levied for general revenue purposes, determine whether the taxes levied by virtue thereof, and under the classification therein adopted are forbidden by the fourteenth amendment to the federal constitution, or whether they lack that uniformity imposed by the constitution of this commonwealth.

The said amendment provides: "Nor shall any state deprive any person of life, liberty, or property without due process of ⁶³⁷ law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is true, as urged, that the equal protection of the laws herein enjoined is a pledge of the protection of equal laws (*Yick Wo v. Hopkins*, 118 U. S. 369, 6 Sup. Ct. Rep. 1064); but it does not forbid a classification of persons or property for various purposes, nor enjoin upon the legislative authorities the impossible duty of making the same or equal laws for the several classes. It does compel the equal application of the laws to all members of the same class, allowing classification, which should be based upon reasonable grounds and is not a mere arbitrary selection: *Gulf etc. Ry. v. Ellis*, 165 U. S. 165, 17 Sup. Ct. Rep. 255.

Such classification is not only allowed, but it is recognized as necessary, in order that uniformity and equality of taxation, and of the just adaptation of property to its burdens may be accomplished: *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 17 Sup. Ct. Rep. 345; *Pacific Express Co. v. Seibert*, 142 U. S. 351, 12 Sup. Ct. Rep. 250.

In all cases where classification for purposes of taxation has been recognized, it has been held that the requirements of the federal constitution have been fulfilled if the rates, though different for separate classes, operate uniformly on each class: *Chicago R. R. Co. v. Iowa*, 94 U. S. 164; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. Rep. 1028; *Commonwealth v. Sharon Coal Co.*, 164 Pa. St. 304, 30 Atl. 127, 128; *Home Ins. Co. v. New York*, 134 U. S. 606, 10 Sup. Ct. Rep. 593; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. Rep. 57.

If the ordinance passed and the classification made therein is not in conflict with the federal constitution or some valid act of Congress, the court may not say whether the law is the best that could have been enacted, or whether the common good demands or requires such a law. We can only determine whether, in such a case, the legislative body, acting under the laws and constitution of this commonwealth, had the power and authority to enact such a law.

The responsibility of the legislative body for so acting, if they had the power so to do, is not to the court, but to the people whom they represent. And for a construction of the federal laws and constitution, we must look to our federal

courts, while the construction of the constitution and laws of the commonwealth, so far as they do not conflict with those of the nation, is determined by our own courts: *Chicago R. R. Co. v. ⁶³⁸ Iowa*, 94 U. S. 155; *Memphis Gas Co. v. Shelby Co.*, 109 U. S. 398, 3 Sup. Ct. Rep. 205; *United States v. New Orleans*, 98 U. S. 381; *Meriwether v. Garrett*, 102 U. S. 472; *Spencer v. Merchant*, 125 U. S. 355, 8 Sup. Ct. Rep. 921, and the cases therein cited; *Palmer v. McMahon*, 133 U. S. 669, 10 Sup. Ct. Rep. 324; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 155, 17 Sup. Ct. Rep. 56; *Lewis v. Monsan*, 151 U. S. 549, 14 Sup. Ct. Rep. 424; *Iowa Cent. Ry. Co. v. Iowa*, 160 U. S. 393, 16 Sup. Ct. Rep. 344; *Central Land Co. v. Laidley*, 159 U. S. 109, 16 Sup. Ct. Rep. 80.

No objection is raised in this case as to the method of making the assessments or arriving at valuations. The principal contention is that by virtue of the classification made unequal burdens and rates are imposed upon the several members of different classes, but it is not alleged, with the exceptions heretofore noted, that the ordinance applies to or is enforced differently against the same members of any class.

We, therefore, conclude that the ordinance in question does not violate the provisions of the federal constitution, and we must determine whether or not it is in conflict with the constitution and laws of this commonwealth.

Article 9, section 1 of our constitution declares that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." We herein have a recognition of the classification of subjects for taxation, and a provision that said taxes must be uniform as to each class.

The constitution of this commonwealth, as well as the federal constitution, not only permits classification of subjects of taxation on a proper basis, and in the approved manner, but the several classes thereby constituted may be taxed independently and differently: *German Life Ins. Co. v. Commonwealth*, 85 Pa. St. 519; *Commonwealth v. Delaware Div. Canal Co.*, 123 Pa. St. 620, 16 Atl. 584; *Pittsburg v. Coyle*, 165 Pa. St. 64, 30 Atl. 452; *Commonwealth v. Germania Brewing Co.*, 145 Pa. St. 86, 22 Atl. 240; *Commonwealth v. Sharon Coal Co.*, 164 Pa. St. 304, 30 Atl. 127, 128.

We must therefore consider whether the classification herein made produces the result of special legislation; whether

taxes imposed are uniform, as required by the constitution, and whether the classification is made upon such basis as is by law required.

It is complained that wholesalers are made a distinct and separate class from retailers, and that the ordinance specially legislates in favor of the wholesalers.

⁶³⁹ This is true, so far as separately classifying the wholesale dealers is concerned, but each member of the subclass of wholesalers is treated alike, and the tax is uniform upon each member of said division or subclass.

We see no objection to classifying wholesalers and retailers separately. The same principle is involved in the subdivision of the wholesalers, as maintains in the general classification under section 3 of the ordinance, and what is said in relation thereto equally applies to the subdivision of wholesalers. If special legislation is produced in this ordinance it is a result of the mode of classification adopted.

The several members of their respective classes and subclasses, with the exception heretofore noted, are treated alike, and the taxes imposed upon them are uniform throughout their class.

Is the classification herein made legal?

In *Ayar's Appeal*, 122 Pa. St. 277, 16 Atl. 356, the court says: "On the contrary, the underlying principle of all the cases is that classification, with a view of legislating for either class separately, is essentially unconstitutional, unless a necessity therefor exists—a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately, that would be useless and detrimental to others."

This is as near to a definition of the requirements for classification as our courts have attempted. It is true this refers to classification for legislative purposes, but we know of no reason why the same does not obtain in the classification for the purposes of taxation. Each class should have purposes to subserve peculiar to itself, and all its members local functions to perform which differentiates them from the members of each and every other class. When such a state of facts exists classification is not only permissible, but is necessary to subserve the purposes of the members, as a part of the body politic, as well as of their individual classes, and may

be the only means whereby uniformity of taxation can be accomplished.

The classification should be according to some reasonable, practical rule, drawn from experience, which would prevent a gross inequality in the burdens of taxation: *Commonwealth v. Canal Co.*, 123 Pa. St. 620, 16 Atl. 584; *Weinman v. Wilkinsburg etc. Pass. Ry. Co.*, 118 Pa. St. 202, 12 Atl. 288.

It is the legislative authority that must determine what difference ⁶⁴⁰ in situation, circumstances, and needs call for a classification, subject, however, to the supervision of the courts, as the final interpreters of the constitution, and to see that the same is really classification and not special legislation: *Lloyd v. Smith*, 176 Pa. St. 218, 35 Atl. 199.

The classification made by this ordinance is as follows:

RETAIL.

Class.	Business.	Tax.
1	Over \$60,000.....	\$100.00
2	\$50,000 to 60,000.....	80.00
3	40,000 to 50,000.....	70.00
4	30,000 to 40,000.....	60.00
5	20,000 to 30,000.....	50.00
6	10,000 to 20,000.....	35.00
7	5,000 to 10,000.....	25.00
8	2,500 to 5,000.....	15.00
9	1,000 to 2,500.....	10.00
10	1,000.....	5.00

WHOLESALE.

Class.	Business.	Tax.
1	\$100,000 and upward	\$60.00
2	60,000 to \$100,000	50.00
3	50,000 to 60,000.....	40.00
4	40,000 to 50,000.....	35.00
5	30,000 to 40,000.....	30.00
6	20,000 to 30,000.....	25.00
7	10,000 to 20,000.....	20.00
8	5,000 to 10,000.....	15.00
9	2,500 to 5,000.....	10.00
10	2,500.....	5.00

Is this classification, made by the proper legislative authority, such as is reasonable, just and proper, or was it passed for the purpose of, or does it produce the result of, special legislation for any of the respective classes?

It is urged that it is unequal and unjust. We again repeat that this may be true, as in most cases of assessments we find like results to a greater or less extent, but unless it is grossly so, or the ordinance enacted with a view or effect of producing ⁶⁴¹ such results contrary to law, the place to seek relief is with the legislative authority.

It is as impossible to produce exact uniformity in levying taxes as it is to give universal satisfaction, but if no legal principles have been violated we are powerless to adjust all of the inequalities complained of.

The knowledge or judgment of the judiciary under given circumstances as to what is equitable taxation is no better than that of the legislative authority, and as this is the department upon whom is imposed the duty of making the adjustment, there it must rest, so long as they act within their authority.

It may be true that the results produced of advantage to the dealers, from the sources to which this general tax is applied, may be in the exact or at least approximate ratio of the burdens imposed by this license tax, and that the expense to the municipality in rendering such protection and producing such results is in like proportion. For example, we certainly could not say that the expense to the city of furnishing police and fire protection to the man who does one hundred thousand dollars' worth of business is one hundred times as great as for that of him who does one thousand dollars' worth.

We know of no better authority to determine the proper ratio and adjust the burdens of taxation in proportion to the expense imposed and benefits received by the various subjects than the one upon which the law now imposes it.

Classification according to the amount of business done has been frequently recognized in this commonwealth and by our federal courts: *Dow v. Beidelman*, 125 U. S. 690, 8 Sup. Ct. Rep. 1028; *Chicago R. R. Co. v. Iowa*, 94 U. S. 164; *Allentown v. Gross*, 132 Pa. St. 319, 9 Atl. 269; *Hadtler v. Williamsport*, 15 Week. Not. Cas. 138; *Williamsport v. Wenner*, 172 Pa. St. 173, 33 Atl. 544.

The last of which cases was very much like the case at bar; and a classification there adopted very similar, though not so justly discriminating as to the smaller dealers, was held to be a valid exercise of the city council.

It is argued, however, that in the case of *Williamsport v. Wenner*, 172 Pa. St. 173, 33 Atl. 544, the initial class was composed of those doing a business of one thousand dollars or less, and paid one dollar, "and every multiple of that amount of business paid a similar multiple of that amount of tax," and that this was fair and equitable.

We do not find that the classification thus adopted produced ⁶⁴² any "fairer" results than does the one at bar. What was argued is true as to the maximum of each class only, and why the man doing eleven hundred dollars' worth of business and paying the same tax as the one doing five thousand dollars' worth can be considered any more of a fair and equitable proportionate adjustment than the one at bar, we do not clearly comprehend.

The right to make such classification seems to be settled by our courts. We are not unfamiliar with a similar classification as to sales, with different rates as to different classes in the state mercantile tax, imposed upon venders of merchandise. True, the act by virtue of which this is made was passed prior to the adoption of our present constitution.

The right to make the classification being determined, we have no doubt as to the legislative authority to impose different "rates" upon the several classes.

And now, July 11, 1898, it is ordered that the defendant pay a fine of seventy-two dollars to the commonwealth for the use of the city of Titusville, and the cost of prosecution, or give security therefor within ten days from this date and in default thereof he shall stand committed to the county jail for a period of twenty days.

An appeal to the supreme court was taken from the judgment of the court of common pleas.

E. Mackey and J. Byles, for the appellant.

G. F. Brown, city solicitor, and F. Gunnison, for the appellee.

PER CURIAM. We concur entirely with the views expressed in the opinion of the learned judge of the court of quarter sessions in this case and on that opinion the judgment is affirmed.

The Principal Case was Taken by writ of error to the supreme court of the United States, and is reported under the title of *Clark v. City of Titusville*, 184 U. S. 329, 22 Sup. Ct. Rep. 389. The judgment of the state court was affirmed. Mr. Justice McKenna, after stating the facts, delivered the following opinion in the United States supreme court:

"The objection that plaintiff makes to the ordinance is that it classifies by amount or value, with the result: 1. That the lowest amount or value of property of a class 'is required to pay the same amount of taxes with the highest amount or value of property therein'; 2. That the differences are not in kind, but only in amount, or value, and that the taxes decrease in rate or ratio as the value of the class increases; 3. That the so-called classes are subdivisions of a class, and taxes are imposed upon such subdivisions without regard to a common ratio, either as between the several subdivisions, or as between the members of each of the subdivisions. These objections are but the expression of the effect of classification by amount, and have been made before and considered before by this court, and the judgment has been adverse to the contention of plaintiff in error. We do not think that it is necessary to review the cases or enter again into the reasoning upon which they were based.

"Classification by amount came up for consideration and decision in *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention, and attempts to limit its decision to the power of a state over inheritances, and to explain by that power, not only the taxes imposed, but the discriminations which were claimed to have resulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion. The contentions of the parties in the case were extremely opposite. The appellee claimed that the power of the state could be exerted to the extent of making the state the heir of everybody; the appellant asserted a natural right of children to inherit. We expressed no opinion on either contention, but chiefly directed our consideration and decision to the alleged discriminating features of the law of Illinois. We said: 'Our inquiry must be, not what will satisfy the provisions of the state constitutions, but what will satisfy the rule of the federal constitution. The power of the states over successions may be as plenary in the abstract as appellee contends for; nevertheless it must be exerted within the limitations of that constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.'

"The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows: /

" 'On each and every one hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and

not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars. Provided, that an estate in the above case, which may be valued at a less sum than five hundred dollars, shall not be subject to any duty or tax.'

"Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the fourteenth amendment of the constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said: 'If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount, but varies with the amounts arbitrarily fixed, and hence that an inheritance of ten thousand dollars or less pays three per cent, and that one over ten thousand dollars pays, not three per cent on ten thousand dollars and an increased percentage on the excess over ten thousand dollars, but an increased percentage on the ten thousand dollars as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of ten thousand and one dollars by the deduction of the tax receives ninety-nine dollars and four cents less than one who is given a legacy of ten thousand dollars. But neither case can be said to be contrary to the rule of equality of the fourteenth amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their legality has never been questioned.'

"Plaintiff in error, however, contends that the tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and is paid by him. But every tax has its final incidence on some individual.

That effect, therefore, cannot be urged to destroy well-recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business, regulated by the amount of sales, and is not repugnant to the constitution of the United States.

"Judgment affirmed.

"Mr. Justice Harlan did not hear the argument, and took no part in the decision."

A Statute Which Imposes a License Tax on all who conduct department stores for the sale of more than one class or group of goods has been held to be class legislation, by making an arbitrary and unreasonable classification of merchants: State v. Ashbrook, 154 Mo. 373, 77 Am. St. Rep. 763, 55 S. W. 627. So has a statute exacting a license and bond from commission men: People v. Berrien Circuit Judge, 124 Mich. 664, 83 Am. St. Rep. 352, 83 N. W. 594. Contra, State v. Wagener, 77 Minn. 483, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; and a statute requiring a license fee to be paid by all persons who peddle in the country, except veterans of the Civil War: State v. Garbroski, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959.

Class Legislation, to be Valid, must extend to and embrace equally all persons who are or may be in the like situation or circumstances, and the classification must be natural and reasonable, not arbitrary and capricious: State v. Garbroski, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959. The legislature, however, may form classes, if it does not arbitrarily discriminate between persons in substantially the same situation: Lasher v. People, 183 Ill. 226, 75 Am. St. Rep. 103, 65 N. E. 663. See the discussion of this subject in the monographic note to State v. Ellet, 21 Am. St. Rep. 780-789.

GUILLE v. CAMPBELL.

[200 Pa. St. 119, 49 Atl. 938.]

MASTER AND SERVANT—LIABILITY FOR ACT OF SERVANT.—If an injury is caused by a servant in the use of means fairly adapted to accomplish the purpose of his employment, his master is liable, though the act of the servant is wrongful or unauthorized. If the act of the servant does not fairly tend to effectuate the discharge of the duty for which he is employed, his master is not liable. (p. 706.)

MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACT OF SERVANT.—If a servant employed to remove bales of cotton from the sidewalk to a warehouse waves a bale hook at boys playing around the bales, for the purpose of frightening them away, and the hook slips from his hand, striking and injuring a boy, who is not about the bales, nor trespassing, or interfering with the work in any way, his master is not liable for the injury thus inflicted. (pp. 706, 707.)

P. E. Rothermel, Jr., and S. M. Clement, Jr., for the appellant.

F. P. Prichard and J. W. Bayard, for the appellees.

120 POTTER, J. Where an injury is caused by a servant in the use of means fairly adapted to accomplish the purpose of his employment, the master is responsible. This is true, even though the act of the servant is wrongful, or unauthorized. But where the act of the servant does not fairly tend to effectuate the discharge of the duty for which he is employed, the master is not liable.

121 In the present case, Fitzgerald, the servant of the appellees, was employed to drag bales of cotton from the sidewalk into the warehouse. A short iron hook was given him for use in handling the bales. While coming out from the warehouse, Fitzgerald saw some boys playing on and around the bales. He made a motion as if to throw the hook at them, in order to frighten them; the hook slipped from his hand, and struck Alfred Guille in the eye, destroying the sight. This boy who was injured was not on the bales, but was standing on the sidewalk near by. There was no evidence that he was making any attempt to trespass upon the property of the appellees, or to interfere therewith in any manner. Neither does it appear that there was any malice upon the part of Fitzgerald; but even if there was, the master would not be relieved of responsibility, if the act was done in the line of duty, for which the servant was employed. The test then is: 1. What purpose did Fitzgerald intend to accomplish by the act which caused the injury? 2. Was this purpose a matter of his own, or was it part of his employment?

The act causing the injury was the waving by Fitzgerald of the iron hook, and allowing it to slip from his hand. His purpose was manifestly to frighten the boys, and drive them away from the bales. But, at the time, it does not appear that any of the boys were in any way obstructing Fitzgerald, or interfering with him in the accomplishment of his work. The boy was struck with the iron hook which had been given to Fitzgerald to use in pulling the bales around, but this use of the hook in converting it into a missile was entirely foreign to that for which it was intended by the master in giving it to the servant. The accident occurred while Fitzgerald was walking from the warehouse out to the bales. But suppose, for the purpose of illustration, that Fitzgerald had been sent from the office to drag in the bales at a point a few blocks distant, and, while upon the way thither, had met a crowd of boys upon the sidewalk, and had waved the hook at them, to clear a passage-

way for himself. If, under such circumstances, the hook had slipped from his hands, striking a boy standing at one side, surely it would not be contended that his employer was responsible for that act; so here, we are not able to say that the ¹²²⁸ act causing the injury was done in carrying out the duty to which the servant was assigned. His duty was simply to lay hold of the bales, and drag them one by one from the sidewalk into the warehouse. In performing this duty, he used the hook to grapple more securely with the bale, and this was the only use for which it was intended, or for which it was supplied by the master. The request to drag the bales of cotton from the sidewalk cannot be held to imply authority to injure a boy standing on the sidewalk looking on at the work. The act of violence by which the injury was occasioned was not done in execution of the authority given, but was quite beyond it, and must be regarded as the unauthorized act of the servant, for which he himself, and not the defendants, must be answerable. Whether this action was simply careless, or whether it was malicious, it was his own, and was not incident to the authority granted. The facts of the case are undisputed; the deviation from the line of the servant's duty was in this case, we think, sufficiently marked to justify the learned trial judge in determining, as a matter of law, that the servant was not doing the business of the master in the performance of the act causing the injury.

The assignments of error are all overruled, and the judgment is affirmed.

The Liability of a Master for the Acts of his servant is discussed in the monographic notes to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 71-93; Ware v. Barataria etc. Canal Co., 35 Am. Dec. 192-201. The rule as to such liability is, that if the act is done without the authority of the master, and not for the purpose of executing his orders or doing his work, then he is not responsible; but if it is done in the execution of the authority given by the master, and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful: McCarthy v. Timmins, 178 Mass. 378, ante, p. 490, 59 N. E. 1038; Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147, 84 Am. St. Rep. 620, 28 South. 823; Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989. It is not within the scope of a servant's authority, to whose custody his master's property has been intrusted to undertake to secure it from future injury by chastising persons who have done damage to it in the past: Brown v. Boston Ice Co., 178 Mass. 108, ante, p. 469, 59 N. E. 644.

KELLER v. SCRANTON.

[200 Pa. St. 130, 49 Atl. 781.]

CONSTITUTIONAL LAW—MUNICIPAL INDEBTEDNESS.

A municipality already in debt up to its constitutional limit cannot, without a vote of the electors, enter into a contract for the building of a viaduct without expense to itself, but which will make it liable for damages to the owners of abutting land. (p. 708.)

CONSTITUTIONAL LAW.—UNLIQUIDATED DAMAGES TO LAND OWNERS from a public improvement are a "debt" within the meaning of constitutional provisions limiting municipal indebtedness. (p. 708.)

CONSTITUTIONAL LAW—MUNICIPAL INDEBTEDNESS.

The words "debt" and "indebtedness," used in constitutional provisions relating to the limit of municipal indebtedness, are not used in any technical way, but in their broad general meaning of all contractual obligations to pay in the future for considerations received in the present. (p. 709.)

CONSTITUTIONAL LAW—MUNICIPAL INDEBTEDNESS.

Taking land by eminent domain proceedings is outside the principle that makes municipalities liable for their wrongful acts, without regard to their indebtedness, and within the constitutional prohibition of a contractual obligation to pay in future for a consideration received in the present. (p. 709.)

L. H. Burns and H. M. Streeter, for the appellant.

A. A. Vosburg, city solicitor, E. Warren, and J. S. Clark, for the appellee.

¹³³ **MITCHELL, J.** The single question which needs discussion is whether a municipality, already in debt up to its constitutional limit of two per cent on the assessed valuation of its property, can, without a vote of the electors, enter into a contract for the building of a viaduct without expense to itself, but which will make it liable for damages to the owners of abutting land. Or to reduce the question to a briefer and more general form, are unliquidated damages to land owners from a public improvement a debt within section 8, article 9 of the constitution?

The language of the section is: "The debt of any county, city, borough, township, school district, or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur ¹³⁴ any new debt, or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation

of property, without the assent of the electors thereof at a public election in such manner as shall be provided by law."

The learned judge below found as facts that "the erection of a viaduct will cause damage to the abutting property owners, and the amount which may be recoverable by them may aggregate the sum of one hundred thousand dollars whenever the same may be liquidated according to law." And that the present debt of the city was already beyond two per cent of the assessed valuation. He further found as conclusions of law that the city of Scranton had no right to increase its present indebtedness without first obtaining the consent of the electors, but that the incurring of this liability for damages to the property owners was not the creation of a debt or the incurring of an indebtedness within the meaning of the constitution.

This conclusion was reached upon the view that the word "debt" in the section of the constitution in question is used in a technical sense, which does not include unliquidated damages sounding in tort. We are unable to assent to this view.

The constitution is to be understood, *prima facie* at least, as using words in their general and popular sense, unless they are clearly technical in their nature. While the word "debt" has a technical use of somewhat more limited signification than its common meaning, yet it is not naturally or usually a technical word. And it is to be noted that the constitution uses in immediate and synonymous connection the word "indebtedness," which is of wider and even less technical significance. On this point the purpose and intent of the constitutional provision are conclusive. It is part of the open history of the times that many municipalities in haste to get the advantages enjoyed by older and wealthier communities entered recklessly into all kinds of projects under the name of public improvements, and in a few years found themselves like heirs to an estate burdened with post obits at ruinous rates, on or beyond the verge of bankruptcy. At the time of the framing of the constitution the subject was fresh in the public mind, notably in the cases of county and city bonds in aid of railroads, etc., in the western states, as found in the reports of the supreme court of the United States. Pennsylvania was not without its own experience two generations ¹⁸⁵ ago in the default of interest, nobly atoned for in the dark days of depreciated currency during the Civil War by the payment of all its obligations in gold, even though not so specified in the bond. The constitutional provision is intended as a restraint on this spendthrift tendency, to

curb the extravagance of municipal expenditure on credit, to prevent municipalities from loading the future with obligations to pay for things the present desires, but cannot justly afford, and, in short, to establish the principle that beyond the defined limits they must pay as they go. No limit is fixed to expenditure for which present means of payment are provided (*Erie's Appeal*, 91 Pa. St. 398), but a peremptory prohibition is put on expenditure on credit beyond the prescribed bounds. "Debt" and "indebtedness" in the section in question are not used in any technical way, but in their broad general meaning of all contractual obligation to pay in the future for considerations received in the present.

It may be that in other sections of the instrument the context may indicate that the same words are used in a more limited and technical sense. It will be time enough to consider those questions when they arise. For the present it is sufficient that the meaning of section 8 is clear.

It is true that the constitution does not exempt municipalities, how great soever their indebtedness, from liability for wrongful and tortious acts. But it does not authorize the voluntary assumption of obligation to pay money by the scheme of a tort. The distinction between real or unpremeditated torts and voluntary acts under the technical name of torts, done by agreement for the accomplishment of a purpose prohibited to be done by contract, is clear and substantial. And that is what we have here. The taking or injury to land by eminent domain is not a tort in the sense of a wrongful act. When the broad distinction of actions into those *ex contractu* and those *ex delicto* was established, damages from the exercise of eminent domain were unknown. When they came into existence they did not strictly fit into either class, but as they were certainly not founded on express contract with the land owner, they were put in the only other class, as torts. But when, as in the present case, the act which is called a tort is done under a contract, and the assumption of the consequent damages is an express term of such contract, we have a perfectly clear case outside of the principle that makes ¹³⁶ municipalities liable for their wrongful acts, without regard to their indebtedness, and within the constitutional prohibition of a contractual obligation to pay in future for a consideration in the present. We are therefore obliged to hold that the ordinance in question is void as increasing the indebtedness of the city of Scranton.

ton beyond its constitutional limits. The other objections to the ordinance are not sustained.

The learned judge below found, *inter alia*, that while the debt of the city of Scranton was above the two per cent limit, yet part of it had been authorized by a vote of the electors, and if this part should be excluded from the computation, the damages under the ordinance for the viaduct would not increase the debt beyond the limit, but he held that the whole debt, authorized by vote or not, must be taken together in computing the two per cent. It is now suggested by the appellees that this ruling was incorrect, and if it should be reversed, the final decree could be affirmed, though for different reasons from those of the court below. This, however, could not be done on the present appeal. The ruling was in favor of the appellant, and of course is not assigned for error. The question, therefore, is not raised by the record as it is now before us for action, and we express no opinion upon it.

It is not improper to say that we have reached our conclusion in this case with reluctance. The improvement intended is one of great importance and value to the public in doing away with a dangerous grade crossing, and the terms are very advantageous to the city. But the bar of the constitutional prohibition is clear, and we may not permit it to be evaded.

Decree reversed and bill directed to be reinstated and injunction issued as prayed. Costs to be paid by appellees.

Municipal Indebtedness.—What is a municipal indebtedness within the meaning of constitutional prohibitions is considered in the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243. There is no distinction between an indebtedness for current expenses, payable out of current funds, and one for the payment of which no provision has been made, and for which the city is liable generally. Both are within the constitutional inhibition: *State v. Helena*, 24 Mont. 521, 81 Am. St. Rep. 453, 63 Pac. 99. The prohibition extends to an indebtedness in the form of a bond, note, or any other kind of obligation, whether in writing or parol, express or implied: *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476. But if it is optional with a city whether it shall pay anything further on a contract, such contract does not create a debt within the meaning of the constitution: *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476.

**EDISON ELECTRIC LIGHT AND POWER COMPANY v.
MERCHANTS' AND MANUFACTURERS' ELECTRIC
LIGHT, HEAT, AND POWER COMPANY.**

[200 Pa. St. 209, 49 Atl. 768.]

CORPORATIONS—FRANCHISES—PRIORITY BETWEEN.
As between two corporations exercising similar franchises upon the same streets, priority carries superiority of right. Equity will adjust the conflicting interests as far as possible, and control both, so that each may exercise its own franchises as fully as is compatible with the necessary exercise of the other's, but if interference and limitation of one or the other are unavoidable, the later must give way, and the fact that it is under contract to the city to do work of a public nature does not alter its position or give it any claim to preference. (p. 713.)

INJUNCTIONS — CORPORATIONS — CONFLICTING INTERESTS.—On an application for an injunction by one electric light company against another, the court will enjoin not only wanton and negligent damage by the defendant, but also all interference which is not strictly unavoidable, and in regard to keeping defendant's wires clear of those in bona fide use by plaintiff and necessary for its business, the injunction must be made absolute without regard to extra cost of other methods. (p. 714.)

F. Gunnison, for the appellant.

H. E. Fish and J. S. Rilling, for the appellees.

218 MITCHELL, J. This decree must be reversed for want of any proper finding of facts upon which it can be sustained. The gravamen of the bill is that the complainant, being in the lawful exercise of its franchises with the consent of the city, is interfered with at present and in danger of further interference in the future, by the defendant placing its wires so as to cross or run between, through, and among the plaintiff's wires in dangerous proximity thereto, and through the space already occupied by plaintiff, and, secondly, through adjacent space necessary to the plaintiff for the growth and future operation of its business. The answers of defendants deny the danger of interference by proximity of the wires, and aver that complainant is occupying an unreasonable and unnecessary space not in good faith for the purposes of its business, but with dead wires merely to obstruct and exclude any other company from the streets.

The court unfortunately made no conclusive finding on these disputed points, though it did find in a general way:

1. That the defendant had strung its wires "in many places in dangerous proximity to the wires of the plaintiff company,

and in some places through and between the wires of plaintiff company. That subsequently to the filing of plaintiff's bill, a very large majority of such interferences were remedied by the defendants, but up to the time of taking the last testimony in this case, on April 14, 1898, the defendants had not so adjusted their lines as to be entirely free from interferences with the plaintiff's line."

2. That "after the city of Erie had entered into the contract with the defendant for the street lighting the plaintiff company, in order to hold the said unoccupied space claimed by it, in many places strung numerous dead wires along its poles and over street intersections, in such a way as to embarrass the defendant in the construction of said extension of its line."

3. That the court was "not satisfied that the defendant, in ²¹⁹ the construction of its line as it now exists, after the correction of the interferences as above stated, has inflicted any wanton, negligent, or unnecessary injury to the electric lines and property of the plaintiff."

On these findings both parties appear to be somewhat in fault, and there is no accurate determination of their respective rights, the court being of opinion that this was unnecessary for the reason set out in the legal conclusions that "as between said plaintiff, engaged as at present exclusively in commercial and private lighting, the defendant, so far as it is engaged exclusively in lighting the public streets by virtue of a city contract, the defendant, although holding the later franchise, by virtue of the public character of its business, has the paramount right of way, so far as is necessary to reach the places where the contract calls for street lighting, by a direct and practical route; but at the same time the defendant, in the construction of its line for the purpose of such street lighting, has no right to do the property of plaintiff any wanton, negligent, or unnecessary damage, and must at all places keep its lines clear from those in actual use by plaintiff wherever it can be done without extra cost."

This principle is wholly inadmissible. How far the city, having agreed to the plaintiff's exercise of its franchises upon the streets, may, under its municipal powers and duties, or under the reservations of its ordinance of consent, subsequently invade or interfere with the franchises, is not now before us. But as between two corporations exercising similar franchises upon the same streets, priority carries superiority of right. Equity will adjust the conflicting interests as far as possible

and control both so that each company may exercise its own franchises as fully as is compatible with the necessary exercise of the other's. But if interference and limitation of one or the other are unavoidable, the later must give way, and the fact that it is under contract with the city for work of a public nature does not alter its position, or give it any claim to preference.

Moreover, the standard of damages indicated by the court that the defendant in the construction and operation of its line must not do "any wanton, negligent, or unnecessary damage," and must keep its lines clear from those of plaintiff, "wherever it can be done without extra cost," is altogether too broad. Equity ²²⁰ will enjoin not only wanton or negligent damage, but all interference which is not strictly unavoidable, and in regard to keeping defendant's wires clear of those in bona fide use by the plaintiff and necessary for its business, the injunction must be absolute without regard to extra cost of other methods.

The further question raised by appellant, of the right of plaintiff to exclude defendants from the occupation of space necessary for plaintiff's business in the proximate future, is not sufficiently presented on the facts of the case, for determination at this time. The court has found that plaintiff has occupied unnecessary space with dead wires to exclude or embarrass defendant, but how far its requirements of space for future growth may be genuine, and how near in the future is not shown.

Decree reversed with directions to rehear and determine the case on the principles of this opinion.

Franchises—Priority.—Where an electric light company receives a municipal license to erect its poles on certain streets, a second company, upon which a similar privilege is conferred, acquires merely subordinate rights. Any interference of its wires with those of the prior licensee may be enjoined: *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377, 36 Am. St. Rep. 868, 26 Atl. 635.

KELLY v. NYPANO RAILROAD COMPANY.

[200 Pa. St. 229, 49 Atl. 779.]

DEEDS—COVENANT RUNNING WITH LAND.—A covenant in a deed by a railroad company for a right of way to "fence and keep such road fenced" is a covenant running with the land, and binding on the successor in title to the railroad company. (p. 715.)

DEEDS—COVENANT RUNNING WITH LAND.—NO CHANGES IN TITLE, however brought about, can affect the liability of the party in possession during the period of his enjoyment, to perform the covenants of the first grantee, running with the land, upon which the grant was made. (p. 715.)

Application for an injunction and for an accounting. Kelly conveyed to a certain railroad company a tract of land for a right of way, the deed containing a covenant that such company should "fence, and keep such road fenced." The Nypano Railroad Company, by foreclosure proceedings, became vested with the title to such right of way. Judgment for the plaintiff, and defendant appealed.

G. W. Haskins, for the appellant.

T. Roddy, for the appellee.

230 PER CURIAM. Those enjoying the estate conveyed by Daniel Kelly on April 3, 1862, can do so only by complying with the conditions upon which it was conveyed. Successors in the title to the Atlantic and Great Western Railroad Company succeed, during the period of their enjoyment of the land, to the liability imposed by Kelly and assumed by his grantee. No changes in the title, however brought about, can affect the liability of the party in possession during the period of his enjoyment to perform the covenants of the first grantee, upon which the grant was made. Though there be no privity of the contract between the original grantor or his personal representatives, and those in possession of the land, there is privity of estate, out of which an implied contract arises to perform, during the period of enjoyment, the conditions upon which the land was conveyed.

The decree of the court below was proper. It is affirmed and the appeal dismissed, with costs to the appellees.

A Covenant by a Railroad Company to fence along its line of road over another's land is a covenant running with the land: See the monographic note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 677, on what covenants run with the land.

CHAMBERS v. KNIGHTS OF MACCABEES.

[200 Pa. St. 244, 49 Atl. 784.]

BENEFIT SOCIETIES—BY-LAWS—SUICIDE “SANE OR INSANE.”—A by-law of a beneficial association providing that no benefit shall be paid on account of the death of a member from suicide while “sane or insane” within five years after his admission is valid and binding upon the member and his beneficiary. (p. 716.)

BENEFIT SOCIETIES—AMENDMENT OF BY-LAWS.—A member of a benefit society who stipulates as part of his contract of membership that he will comply with the laws of the order then in force, or that may thereafter be adopted, is bound by subsequent amendment to a by-law in force when he became a member. (p. 716.)

J. W. Sproul, C. L. Covell, and C. G. Olmstead, for the appellant.

Benson & Brooks and S. F. Bowser, for the appellee.

245 WALLING, P. J. In my opinion the plaintiff is entitled to recover the sum of seventy dollars and sixty cents, with interest from December 30, 1898, and no more. Plaintiff's husband, George F. Chambers, on whose life the beneficiary certificate in question was issued, joined the order April 24, 1894. He committed suicide, while insane, on September 30, 1898. The by-laws of the order in force at the time of his death provided that no benefit should be paid on account of death of a member from suicide within five years after admission “whether the member taking his own life was sane or insane at the time.” Such a provision is valid: *Tritschler v. Keystone Mut. etc. Assn.*, 180 Pa. St. 205, 36 Atl. 734; *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360. It is true that at the time he joined the order the provision in the by-laws as to suicide was only for one year, and that more than a year after he became a member the by-laws were amended extending such provision for five years as above referred to. It is also true the beneficiary certificate, on which this action is founded and which formed his contract with the defendant, stipulates for the payment of the benefit in controversy to plaintiff, “provided he (George F. Chambers) shall have in every particular complied with the laws of the order now in force, or that may hereafter be adopted.” It was a part of his contract that he would comply with by-laws thereafter adopted.

That by-laws so made are valid, both as to the member and his beneficiary, in cases exactly like this, has been held by many courts of high authority: See 3 Am. & Eng. Ency. of Law, 2d ed., 1065; Supreme Lodge Knights of Pythias v. La Malta, 95 Tenn. 157, 31 S. W. 493; Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Supreme Lodge Knights ²⁴⁶ of Pythias v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; Fullenwider v. Supreme Council of the Royal League, 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Pain v. Société St. Jean Baptist, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502. The defendant is a beneficiary order and not an insurance company. No right became vested in the plaintiff by virtue of said certificate until the death of her husband. The defendant's obligation to pay the benefit was conditioned upon the member's compliance with the laws of the order then in force or that might thereafter be adopted. This case is very different from Hale v. Equitable Aid Union, 168 Pa. St. 377, 31 Atl. 1066. In that case the certificate of membership stipulated that at the expiration of twelve years the member, if living and in good standing, should receive one-half of the amount of his certificate, and while there the right to amend the by-laws was reserved to the order, it was held that such specific agreement to pay a certain amount at a certain time was not necessarily a part of the constitution and by-laws, and that such contract could not be nullified by a change of the by-laws. And besides, as I understand that case, the by-laws in question were not changed until after plaintiff's rights had become vested. In the case at bar, had said George F. Chambers died before the amendment to the by-laws, a different case would be presented. Then the case of Becker v. Berlin Ben. Soc., 144 Pa. St. 232, 27 Am. St. Rep. 624, 22 Atl. 699, would be in point; for it is there held that where a society has become liable to a member for sick benefits, it cannot avoid such liability by a subsequent amendment of its by-laws. But it is there stated that had such amendment been made before the member was taken sick, he would have been bound by it. And said last-named case reaffirms the case of St. Patrick's Male Ben. Soc. v. McVey, 92 Pa. St. 510, where it is held that "a member of an incorporated beneficial society does not stand in the relation of a creditor to the society, and can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief." At the time of the amendment of the by-

laws in the present case the member, George F. Chambers, was living and of sound mind. The amendment referred to the personal conduct of the members. It was such, in my opinion, as the order had power to make under the right of amendment reserved in the certificate in question. On January 19, 1901, Judge Landis, of Lancaster county, handed down ²⁴⁷ an opinion in the case of Reynolds v. Supreme Conclave Improved Order Heptasophs, which sustains our position in this case.

The assessments paid by Mr. Chambers on the certificate amount to seventy dollars and sixty cents, which amount, under the said amended by-law, should be paid to the beneficiary with interest from ninety days after his death, to wit, from December 30, 1898, which interest to date amounts to nine dollars and forty-seven cents, making whole amount eighty dollars and seven cents.

On March 6, 1901, Judge Stowe, of Pittsburg, filed an opinion in case of Firley v. Supreme Conclave Improved Heptasophs which is also an authority in support of our position in this case. And now, March 25, 1901, on the case stated, judgment is entered in favor of the plaintiff and against the defendant in above case for the sum of eighty dollars and seven cents, and costs of suit.

PER CURIAM. We affirm the judgment entered in favor of the plaintiff and against the defendant for the sum of eighty dollars and seven cents, and costs of suit. We rest our affirmance of the judgment on the opinion of Judge Walling, which appears to us conclusive of the question involved in the case stated.

Benefit Society—Suicide.—A benefit society may provide in its certificate of membership or in its by-laws that it shall not be liable for benefits in the nature of life insurance on the death of a member by suicide: See the monographic note to Supreme Conclave etc. v. Miles, 84 Am. St. Rep. 553.

Benefit Society—Change of By-laws.—If a member in a benefit society agrees to be bound by future by-laws, they have a retroactive application as to him because of his voluntary agreement: See the monographic notes to Strauss v. Mutual Reserve etc. Assn., 83 Am. St. Rep. 715; Supreme Conclave etc. Co. v. Miles, 84 Am. St. Rep. 553, 554.

IN RE KELLY'S CONTESTED ELECTION.

[200 Pa. St. 430, 50 Atl. 248.]

CONSTITUTIONAL LAW—CONTESTED ELECTIONS—CRIMINATING TESTIMONY.—Two constitutional provisions, one providing that "in criminal prosecutions the accused cannot be compelled to give evidence against himself," and the other that "in trials of contested elections no person shall be permitted to withhold his testimony upon the ground that he may criminate himself, but such testimony shall not afterward be used against him, in any judicial proceeding except for perjury in giving such testimony," are not in conflict. Hence a witness cannot withhold his testimony on the trial of a contested election on the ground that such testimony may criminate him. (p. 719.)

CONTEMPT—REFUSAL TO ANSWER QUESTIONS.—A witness who refuses to answer questions propounded to him by examiners in a contested election case, appears in court and answers a rule to show cause why he should not be committed for contempt, and refuses to obey an order made upon him to appear before such examiners and answer their questions, is guilty of contempt committed in open court. (p. 720.)

I. H. Burns, H. W. Palmer, and E. H. Connell, for the appellant.

R. H. Holgate and J. J. H. Hamilton, for the appellee.

⁴³¹ DEAN, J. In a contested election case in the quarter sessions over the office of county treasurer of Lackawanna county, the court appointed two examiners, W. R. Lewis and T. J. Dugan, to take testimony.

Gibbons, the appellant, was subpoenaed as a witness before them. He appeared and was sworn, but refused to answer certain questions which are set forth in the record touching the corrupt use of money by him to influence voters, on the ground that such answer would tend to criminate him. Thereupon the examiners certified the proceedings to the court, with copies of the questions and refusal of the witness. The court ruled that he should answer in full; he peremptorily refused the second time, and the court attached him for contempt. On his application, Judge Smith, of the superior court, directed a writ of habeas corpus to issue, and, pending hearing on a certiorari by that court, he was admitted to bail. On hearing,⁴³² the superior court affirmed the decree of the court below, and now Gibbons appeals to this court from that decree.

The weight of the appellant's argument is directed toward sustaining these three propositions: 1. Under the bill of rights

of the constitution of Pennsylvania the defendant could not be required to give evidence against himself; 2. Under the constitution of the United States, no citizen can be required to give evidence against himself, anything in the constitution or laws of any state to the contrary notwithstanding; 3. If any contempt were committed, it was not in open court, or before the court, but before two examiners not sitting as a court, and, therefore, the court of quarter sessions has no jurisdiction.

The superior court in opinion filed has so fully and completely answered the first two propositions of appellant's counsel on both reason and authority, that it would be little more than repetition for us to discuss them at any length.

The accused was not directed to give evidence against himself. Section 9 of the bill of rights declares that: "In criminal prosecutions, the accused cannot be compelled to give evidence against himself." Then in article 8, section 10, is this clause: "In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony, upon the ground that he may criminate himself or subject him to public infamy, but such testimony shall not afterward be used against him in any judicial proceeding except for perjury in giving such testimony."

The argument that section 10 is fatally repugnant to section 9 of the bill of rights, and that the latter must prevail, is without force. Assuming that the witness' answer would disclose the fact that he used money to purchase the votes of certain electors, his answer could not be used against him in any legal proceeding; therefore he would be subject to no penalty or fine involving deprivation of liberty or forfeiture of land or goods. The most that he could suffer would be that odium which attaches to moral turpitude. This is a penalty which every witness suffers who testifies to the truth in ordinary issues ⁴³³ tried every day in our courts, when he admits he was engaged in shady transactions, yet still not so flagrant as to be the subject of indictment in criminal courts. His statement subjects him to no higher penalty than moral degradation, which is not a subject of criminal prosecution.

The construction contended for by appellant would completely nullify section 10 and leave to corruption of the ballot complete immunity. It must be construed in harmony with the bill of rights, and thus the full effect be given to both sections, as the framers of them and the people intended. As is

aptly said by the superior court: "Its [the constitution's] manifest purpose was to protect the purity of the ballot-box, as fraud upon the ballot-box is a crime against the nation. . . . Hence it was that the framers of the constitution sought to arrest the evil by embodying in the fundamental law the provision referred to. It is our duty to give it such a construction as will carry out the intent apparent on its face, and the object which the people had in adopting it: Commonwealth v. Walter, 83 Pa. St. 107, 24 Am. Rep. 154."

As to the second proposition, that under the constitution of the United States no citizen can be compelled to give evidence against himself, it has been sufficiently answered by what has been said in discussing the first proposition.

As to the third proposition, while at first we were in some doubt, a more careful examination of the controlling facts ascertainable from the record, as well as more deliberate consideration of the law applicable to them, leads us to the conclusion that the superior court was right also in dissenting from this argument.

The refusal to answer was announced in open court. It will be noticed from the record that when the examiners first certified the refusal to answer to the quarter sessions, the court directed him to appear before the examiners and make answer to the interrogatories then before it; he again refused; then a rule was awarded on appellant to appear before the court to show cause why he should not be attached for contempt. He then appeared in court with his counsel and read his written answers, refusing to respond to the questions.

It is argued the record does not show that under the act of ⁴³⁴ 1836 the offense was in open court, therefore, a fine alone could be imposed.

This is a mistake; he appeared in open court and made answer to the rule to show cause why he should not be attached for contempt, and, in his answer, refused to obey the order. This was not only technically, but actually, a repetition of the offense in open court.

We do not decide that where mere examiners are appointed by the court to perform duties wholly clerical, and the judge of the court does not sit with them, that they, in the performance of their duties, are not to be deemed the court, when they certify contumacy or misconduct of a witness to the judge; that question can be left open for future consideration. Here the

witness committed the offense in open court, as well as before the court's examiners.

All the assignments of error are overruled, the decree is affirmed, and appeal dismissed, at cost of appellant.

The Privilege of a Witness as to incriminating testimony is discussed in the monographic notes to *Evans v. O'Connor*, 75 Am. St. Rep. 318-347; *Fries v. Brugler*, 21 Am. Dec. 55-62. Under a purity of election law exempting a person giving evidence against others from prosecution, he is not protected as a witness from answering upon the ground that his evidence may tend to incriminate him: *Ex parte Cohen*, 104 Cal. 524, 43 Am. St. Rep. 127, 38 Pac. 364.

Contempt.—A witness who refuses to answer questions propounded to him concerning violations of the purity of election law by others with whom he has co-operated, may be committed for contempt: *Ex parte Cohen*, 104 Cal. 524, 43 Am. St. Rep. 127, 38 Pac. 364.

NOONAN v. PARDEE.

[200 Pa. St. 474, 50 Atl. 255.]

MINES AND MINING—RIGHT TO SURFACE SUPPORT.—In case of a horizontal division of land, the owner of the subjacent estate, coal, or other mineral owes to the superincumbent owner an absolute right of support arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if it is necessary to that end to leave every particle of the mineral untouched under his land. (p. 725.)

MINES AND MINING—SURFACE SUPPORT.—CAUSE OF ACTION for failure to afford sufficient surface support arises at the time when the mineral constituting such support is removed, although the surface owner may have been ignorant of the violation of his right to support. (p. 726.)

MINES AND MINING—SURFACE SUPPORT—RIGHT OF ACCESS TO MINE.—The right of the surface owner to surface support gives him the right of access to the mine to enable him to see that his right is being maintained by the performance of the duty owing to him by the mine operator. (p. 727.)

MINES AND MINING—SURFACE SUPPORT—STATUTE OF LIMITATIONS.—If the failure to furnish sufficient surface support arises from mining either by the mine owner or his predecessors, more than six years before suit, the action is barred by the statute of limitations, but the right to sue passes to the surface owner who is in possession when the subsidence occurs without regard to the date of his conveyance, and this right is barred by limitation if the cause of the subsidence arose more than six years before suit brought. (p. 729.)

MINES AND MINING—SURFACE SUPPORT—STATUTE OF LIMITATIONS.—Even if the main body of the mineral under

the surface owner's land has been mined out more than six years before suit brought, yet if the mine owner has done additional mining by the removal of mineral left in previous work, or by robbing of pillars within six years before suit, and without such additional mining the surface would not have subsided during plaintiff's occupancy, the mine owner is answerable in damages therefor. (p. 729.)

MINES AND MINING—SURFACE SUPPORT—LIMITATION OF ACTION.—If a mine operator, by mining within six years another underlying seam, whereby the pillars and support left in the seam above, which otherwise would have been sufficient support to the surface, have been rendered insufficient, and a "cave-in" has occurred, the mine operator is liable to the surface owner in damages. (p. 729.)

MINES AND MINING—SURFACE SUPPORT—MEASURE OF DAMAGES for the removal of surface support unlawfully by mining is the actual loss sustained to the land, including the buildings thereon caused by the "cave-in." (p. 730.)

MINES AND MINING—SURFACE SUPPORT—LATERAL SUPPORT—ALLEGATIONS AND PROOF.—If the sole cause of action alleged is the removal of surface support by mining, no recovery can be had on proof of the removal of lateral support, as the duty of maintaining surface support and of maintaining lateral support are entirely different, and the rule of damages is not the same in both cases. (p. 731.)

J. G. Johnson and H. W. Palmer, for the appellant.

J. T. Lenahan, T. W. Hart, and E. A. Lynch, for the appellee.

480 DEAN, J. The plaintiffs purchased a lot by deed of April 22, 1890, in the borough of Hazleton, Luzerne county, and erected upon it a dwelling-house. While they occupied the house on January 11, 1892, the ground under it and in the neighborhood subsided, leaving a saucer-like depression about three feet deep in the middle and extending over about two acres. The subsidence or "cave-in" was caused by the mining of coal by the defendant, or his predecessors, under the subsided land; whether immediately under plaintiff's lot, or at some distance, is in dispute on the evidence. It is also in dispute as to the time the mining was done which caused the immediate injury. The plaintiff's deed was from one McAllister, whose title ran back through several grantors to one Michael Dugan, the last-named grantee's deed being from the Lehigh Valley Railroad Company, and is dated July 31, 1869. At that date the company was owner of both this surface and the coal underneath. In the deed is this provision: "And it is hereby made a condition of this grant, and expressly covenanted and agreed, that the said Lehigh Valley Railroad Company, their successors and assigns, do except and reserve and shall always

possess the exclusive privilege of mining under the lot of land herein conveyed, for coal and other minerals; and for that purpose may extend such tunnels, drifts, or excavations under the same, or any part thereof, as shall be ⁴⁸¹ necessary or convenient for the mining and removal of such coal or other minerals, subject to the condition that the surface earth covering such coal or other minerals shall not be in any manner cut, broken or displaced; and that every damage which may be done to the said lot, or the buildings erected thereon, by the exercise of the mining privileges, herein reserved, shall be made good by the said Lehigh Valley Coal Company."

The defendant's testator had, about the year 1874, become the lessee of the coal from the Lehigh Valley Railroad Company. It will be noticed this was many years before the plaintiff's conveyance of April 22, 1890; at the date of the injury, defendant was in possession of and operating the mines.

We do not think the stipulation in the railroad company's deed, so far as the evidence in this case is concerned, modified the defendant's liability as an operator or miner of the coal underneath the surface. The covenant in the deed neither expressly nor impliedly relieved the covenantor or its lessees from the duty of leaving sufficient support for the surface. It is little more than a reservation of the coal for itself and assigns and a stipulation for the performance of a common-law duty on its part and that of its assigns.

There was evidence that the mining which caused the injury had been done directly underneath the plaintiff's lot many years before the date of his deed, and that none was done afterward; and there was evidence on the part of the plaintiff that considerable mining had been done underneath after their occupation. In both aspects of it, this evidence had a direct bearing on the issue as made up by the pleading. The suit was trespass against the lessee of the railroad company.

The declaration is as follows: "On the 11th of January, A. D. 1892, the said defendants, under a grant of coal under said lot, said grant being made subsequent to the deed from said company to said Dugan, removed the coal under the surface earth of said lot No. 9, and so cut, broke, and displaced the earth that the surface fell in and the dwelling-house of the plaintiff thereon became greatly damaged, whereby the surface of said lot No. 9, of the value of fifteen hundred dollars, was wholly destroyed; and the house thereon damaged in three

thousand dollars; wherefore, plaintiff claims from defendant four thousand five hundred dollars." The injury, and only injury, here alleged is, that defendant ⁴⁸² removed the coal under the surface of lot No. 9, and to that averment only did the defendant plead. He averred and argued that no mining had been done by him after the plaintiff's purchase and occupation of lot No. 9; yet the latter was permitted to recover on evidence showing a removal of the coal antedating his deed—a fact not averred. If the cause of the injury was bad mining before January 11, 1892, or the failure before that date of defendant, while mining, to leave sufficient props and supports for the surface, while the "cave-in" only occurred at that date, those who mined the coal would be clearly answerable. In this case it is alleged this defendant mined the coal either before or after the plaintiff's deed. If the mining which caused the subsidence was more than six years before suit brought, and the injury occurred within six years, even though the miner or operator was still in possession, he is not answerable in damages, for there is no right of action for damages until the damage occurs.

The first question raised by the assignments of error is, What was the date of the cause of action? A cause of action is that which produces or affects the results complained of. Where there has been a horizontal division of the land, the owner of the subjacent estate, coal or other mineral, owes to the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even, if to that end, it be necessary to leave every pound of coal untouched under his land: *Berwind v. Barnes*, 13 Week. Not. Cas. 541. Also the English case (*Harris v. Ryding*, 5 Mees. & W. 60), in which Baron Parke uses this language: "I do not mean to say that all the coal does not belong to the defendants, but they cannot get it without leaving sufficient support." We have followed rigidly this rule, as thus tersely suggested, in all our decisions on the subject, and they have been many. Of course, defendant had a right to all the coal under this lot, but he had no right to take any of it, if thereby, necessarily, the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface. So there is nothing gained by adducing

evidence of good or bad mining, or by a discussion of that subject.

⁴⁸³ The adjacent owner in this case at some time failed in duty to the owner of the surface of this lot. The mere fact that it caved in because the coal had been mined underneath demonstrates this failure. When the coal was removed without leaving sufficient pillars, or without supplying sufficient artificial props, was the time when the subjacent owner failed in an absolute duty he owed to his neighbor above; and from that dates the cause of action. Unless, when the coal was mined, the miner left no pillars, or too few, or of too small dimensions for such a mine, or did not replace the coal with ample artificial durable props, there was no cause of action; for, as is said by Erle, J., in *Bonomi v. Backhouse*, 9 H. L. Cas. 503, 96 Eng. Com. Law, 642: "As a general principle, it is difficult to conceive a cause of action from damage when no right has been violated and no wrong has been done." That was also a mining case. It was held that the check upon mining was for the protection of the surface, and that "the surface owner, taking that advantage, may not unreasonably be held to take it with ordinary legal incidents, among others, a liability to be barred by six years from the wrongful act. In case of mining operations which are a trespass, the statute runs from the trespass, though the party may have been ignorant of the act done. The same rule may, with equal justice, apply to a surface owner notwithstanding he may have been ignorant of the violation of his right to support." This opinion was concurred in by the other two justices, Campbell and Coleridge, but on appeal to the house of lords, the judgment was reversed. So in that case, the final judgment in effect declared that the date of the "cave-in" was the date from which the statute began to run. There are other English cases to the same effect and others directly to the contrary. So conflicting are the decisions, that the law on the subject in England cannot be considered settled. Cases on each side, including *Bonomi v. Backhouse*, 9 H. L. Cas. 503, 96 Eng. Com. Law, 642, have here been cited by both appellant and appellee. We think the opinion of Erle, J., from which we have quoted, by far the most satisfactory in its reasons, and more in accord with the conditions of coal mining in this country; and, as we are not bound by the final judgment in the law of England, we prefer to follow the opinion which meets our view of the law applicable to the facts

before us. This court refused to follow *Bonomi v. Backhouse*, 9 H. L. Cas. 503, 96 Eng. Com. Law, 642, in the late case of *Lewey v. Fricke Coke Co.*, 166 Pa. St. 536, 45 Am. St. Rep. 684, 31 Atl. 261. But this last case is clearly distinguishable from an action for failure to afford the surface sufficient support. *Lewey v. Fricke Coke Co.*, 166 Pa. St. 536, 45 Am. St. Rep. 684, 31 Atl. 261, was where the defendant, from an adjoining mine, had mined and removed the plaintiff's coal underneath his land, yet did not disclose the fact, and plaintiff did not discover it until after the six years had run. We held, on the facts of that case, that the statute only began to run from the time of plaintiff's discovery, and this on the grounds that the mining of his coal was a wrong and the concealment of the wrong a fraud. He had no means of discovery; had no right of access to the mine to make observations and defendant no right at all under his land; he had no reason to suspect or presume that one who had no claim of right would wrongfully enter on his land and dig his coal. But here, the parties who mined this coal had a right so to do; a right reserved by the original owner. The surface owner too, had a right of sufficient support; these mutual rights gave the surface owner access to the mine to see that his right was being maintained by the performance of the duty owing to him by the coal operator. And the courts will enforce this right of access if the mine operator denies it. This has been decided in a number of cases. In this case, the right of action arose when the mine operator failed to furnish sufficient support; that may have been more than six years before suit brought, or it may not; it may have been partly due to mining before and partly to mining afterward, in which latter case the action would not be barred; if wholly due to the removal of coal six years before suit brought and failure then to leave sufficient support, the action would be barred. The date of the "cave-in" and partial destruction of the house is not the date of the cause of action; that was only the consequence of a previous cause, whether one month or twenty years before. It is argued that in some cases the surface owner could not know by the most careful observation whether the mine owner had neglected his duty within six years. We answer that is only one of the incidents attending the purchase of land over coal mines; it is not improbable that the risk enters largely into the commercial value of all like surface land in

that region. But however this may be, we hold that the miner is not forever answerable for even his own ⁴⁸⁵ default; further, in no case is he answerable for the default of his predecessor before his possession. Neither equity nor law demands that any greater burden should be placed upon him than that indicated; any heavier one would encourage the purchase of surface over coal mines for speculation in future lawsuits. We cannot concur in the argument of appellant's counsel that plaintiffs could have had no cause of action antedating their deed. By their conveyance there passed to them all the rights of their grantor. If the cause of the injury was within six years, although at the date of the deed the damage was not susceptible of computation, yet afterward became so by the subsidence of the surface, their right to sue was then fixed—a right which, from the nature of the case, could not have had more than a doubtful existence before the actual damage occurred. We do not think *Turnpike Road v. Brosi*, 22 Pa. St. 32, cited to sustain the argument that the right to sue does not fall to the owner who is in possession when the result demonstrates the cause of action arose before the date of his deed, is in point. Justice Lewis, in that case, says: "It is certainly true that the purchaser of an estate cannot claim damages for an injury done to it before his purchase. Such claim is a chose in action, which remains in the hands of the vendor. The vendee is presumed to pay less for his estate on account of the injury, and has, therefore, no claim to recover damages for it." But he is speaking there of the damages arising from the exercise of eminent domain by turnpike and railroad companies. In all such cases the injury is palpable. When the corporation enters upon the land and makes its survey, it then appropriates; the extent of its excavations and embankments, as well as the quantity of land to be occupied, are as well known then as months afterward, when the work is done. There is no reason why the grantee of the land, in the interval between the appropriation and the completion of the work, should be compensated in damages, when he has probably gained a reduction in price, because of the damage equal to the amount of damage.

But none of these reasons appear in this class of cases. When the right to sufficient support has been violated, the cause of action, it is true, arises, but the owner in possession

when the consequences follow is the one who suffers. There may, in the interval have been several owners, none of whom sustained ⁴⁸⁶ damage except the last; he alone has the right to sue, because to him only has passed the right to enforce by suit the collection of a damage occurring during his possession. Until they actually occur, no one can tell when they will occur, or that they ever will. Each grantee has the right to presume that the subjacent owner has performed his legal duty, and the price, while probably somewhat depreciated by the possible risk, is not fixed on a presumption that his land will subside because of any special failure in duty on the part of him who has taken out the coal.

There is some evidence tending to show that the "cave-in" was because of work within six years by defendant, in the Mammoth seam, the first stratum of coal below the surface; also evidence tending to show very recent mining in the Wharton seam, the next one underneath the Mammoth, and that from one or the other cause, or from both combined, the subsidence was caused. On the whole case we deduce these propositions:

1. If the failure to furnish sufficient support to the surface was from mining, either by defendant or his predecessors, more than six years before suit, the action is barred by the statute of limitations.

2. The right to sue passes to the surface owner who is in possession when the subsidence occurs, without regard to the date of his conveyance; this right is barred by the statute of limitations if the cause of the subsidence arose more than six years before suit brought.

3. Even if the main body of the coal under plaintiff's land has been mined out more than six years before suit brought, yet if the defendant has done additional mining by removal of coal left in previous work, or by robbing of pillars within six years before suit, and without such additional mining, the surface would not have subsided during plaintiff's occupancy, yet if such additional work or mining hastened the result, the defendant is answerable in damages therefor.

4. If defendant, by mining within six years another underlying seam (the Wharton), whereby the pillars and support left in the seam above (the Mammoth), which otherwise would have been sufficient support to the surface, have been rendered

insufficient, and the "cave-in" occurred, defendant is answerable to plaintiff in damages.

⁴⁸⁷ 5. If plaintiffs be entitled to recover, their measure of damages is the actual loss they have sustained to their land, including the building thereon, by reason of the "cave-in." The difference in the market value before and after the injury in this class of cases is not the true rule; in this case, under the evidence, perhaps it worked no injustice, but in many cases it would do so.

In a case of this character it is of the utmost importance that the averments should be more specific as to the time the coal was mined under the lot and as to who mined it. While, probably, we would not reverse for this paucity in the statement, nevertheless it would greatly aid in a correct review of the case if all the grounds of action were clearly and more specifically stated.

But the learned judge of the court below went much further than instruction on the matter so meagerly averred, and which was the only issue in the case. Evidence was offered and received tending to show that defendants were mining coal at a distance from the lot in question in other parts of the Hazleton mine; from this evidence plaintiffs argued that even if their property had not been injured from lack of surface support in the mine underneath it, the subsidence was caused at the point under the lot, by removing lateral support at other mines some distance from the lot in question. There was some evidence given to sustain this view, and the court charged as follows:

"It would appear generally from the testimony that the injury complained of here did not come from the immediate mining and its consequences. Did it come from any other source? Mr. McNair has testified (and he is a mining engineer and has been in charge of these mines, and knows all about the inside operation of them) that there was no immediate mining under this property, to the best of his judgment, since 1858. If you should find that this injury did not come from the immediate mining under the property, did it come from the general mining carried on by these defendants in the Hazleton mines, which were generally a part and parcel of these mines? If it did, and you should so find, then these defendants, under the law, would be liable in damages

for the amount of the injury which you find the plaintiffs sustained."

The defendant assigns this instruction for error. When we ⁴⁸⁸ consider that there is not an intimation in the statement that any such cause for the injury ever had an existence, it is somewhat difficult to conceive how it could have been adopted as one of the grounds of recovery. Damage for failure to furnish vertical support to the surface in mining underneath is a well-known cause of injury to the surface owner; but that an adjacent owner has, by removing lateral support, caused a vertical subsidence of the surface, is an altogether different averment of the ground of complaint. He may be the same or some other than the operator of the mine underneath. His duty is not in all respects the same; the rule for the computation of damages is not the same. The authorities are in substantial accord on this question, though not giving the same reasons: *Richards v. Jenkins*, 16 L. T. 437, 17 Week. Rep. 30; *Corporation of Birmingham v. Allen*, L. R. 6 Ch. D. 284; *Dalton v. Angus*, L. R. 6 App. Cas. 791; *McGettigan v. Potts*, 149 Pa. St. 158, 24 Atl. 198. In the last cited case it is decided that: "The rule that the owner is entitled to lateral support for his ground extends only to support for his ground in its natural state, and does not include such support for the protection of buildings or other structures placed upon it. Where, by reason of an excavation, without negligence made by defendant on his own land, the land of the plaintiff sinks or falls away, the measure of damages is not the diminution in value of the lot of the plaintiff, by reason of the defendant, but the amount of injury actually done to the plaintiff's land. The measure of the damages where land is taken by right of eminent domain, which is the difference between the value of the whole of the plaintiff's land before the taking and its value immediately afterward, has no jurisdiction in such case."

We do not decide that plaintiffs might not have originally embraced in the same statement this cause of action, for we are of opinion they might have done so. But they did not; they could not recover on it when they alleged but the one cause, and that a different one. It was plainly error to admit, under this statement, the evidence tending to show a destruction of lateral support. The defendant had not been called into court to answer such complaint, and ought not to

have had a possible verdict on that ground against him. It is now too late, under the authorities, for plaintiff to introduce this new cause of action ⁴⁸⁹ under an amendment, for the statute of limitations bars it. See a full discussion of this subject by Sharswood, J., in *Wilhelm's Appeal*, 79 Pa. St. 134.

Appellant's third assignment of error is sustained; the others are not. We have noticed them to the extent of pointing out the course the trial should take upon a new venire, so that, if possible, we may be saved from a second review.

The judgment is reversed and a venire facias de novo awarded.

Surface Support.—A servitude of sufficient surface support exists in favor of the upper estate, where one person owns the surface and another the underlying mineral. The latter is liable to the owner of the superincumbent estate for injuries by subsidence: *Williams v. Hay*, 120 Pa. St. 485, 6 Am. St. Rep. 719, and cross-reference note thereto, 14 Atl. 379. The rules of law applicable to subjacent and adjacent support are similar. Where the lateral support is removed, the damages therefor may include injuries to the buildings. Since the right the party whose land is interfered with is merely a right to the ordinary enjoyment of land, no cause of action therefor will accrue until the damage actually occurs: See the monographic note to *Larson v. Metropolitan Street Ry. Co.*, 33 Am. St. Rep. 446, 472, 474.

FITZGERALD v. EDISON ELECTRIC ILLUMINATING COMPANY.

[200 Pa. St. 540, 50 Atl. 161.]

NEGLIGENCE—DUTY AS TO ELECTRIC WIRES.—A person or company using wires charged with an electric current is bound, while the public is not, not only to know the extent of the danger arising from them, but to use the very highest degree of care practicable to avoid injury to everyone who may lawfully be in proximity to such wires and liable to come accidentally or otherwise in contact with them. The duty is not only to make such wires safe by proper insulation, but also to keep them so by constant oversight and repair. (p. 733.)

NEGLIGENCE—NOTICE OF DEFECTIVE INSULATION OF ELECTRIC WIRE.—If recovery is sought against an electric light company for a death caused by a defectively insulated wire, plaintiff is not bound to show direct and express notice of the defect, but may show that it has existed for such a period of time that it ought to have been known to the company. (p. 733.)

NEGLIGENCE—DEFECTIVE INSULATION OF ELECTRIC WIRES—EVIDENCE.—If a person goes upon a roof in the lawful

exercise of his business, and while so engaged is killed by a defectively insulated electric wire coming in contact with him, and it is shown that the insulation has been defective for some considerable time, the question of negligence is for the jury, but evidence that the wire had been put on the roof without the consent or against the protest of the owner of the house is not admissible to establish such negligence. (p. 733.)

Fitzgerald, a house painter, went upon the roof of a house, intending to reach downward and paint the cornice thereof. He found defendant's electric wires crossing this cornice and a portion of the roof. He procured a board and propped up the wires to enable him to paint the cornice, and while he was engaged in such painting the board and wires fell, the wires coming in contact with him and so shocking him that he was knocked to the ground and died from the injury thus sustained. Judgment for the defendant and plaintiff appealed.

W. F. Beyer and B. F. Eshleman, for the appellant.

W. U. Hensel, D. McMullen, and H. M. North, for the appellee.

⁵⁴³ MITCHELL, J. Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however, which uses such a dangerous agent is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires and liable to come, accidentally or otherwise, in contact with them. The defendant, in accord with the common practice of electric companies, recognized this obligation by insulating its dangerous wire.

But the duty is not only to make the wire safe by proper insulation, but to keep it so by constant oversight and repair. Appellant at the trial offered to show that this had not been done, that the insulation had been defective for several weeks, as had been shown by the wire "spitting fire" when blown against ⁵⁴⁴ the corner of the roof. This testimony was excluded, and in that there was error. The case in this aspect is analogous to an action against a municipal corporation for

injury from a defective highway. The plaintiff is not bound to show direct and express notice of the defect, but may show that it has existed for such a period that it ought to have been known to the authorities. And this raises a question for the jury. The excluded testimony in the present case was relevant and material on the question of the defendant's negligence in that respect, and as such should have been admitted.

It was not error, however, to exclude the testimony that the wires had been put there without the consent or against the protest of the lessee or owner of the house. In an action by such lessee or owner for injury by fire or otherwise to the house, the trespass might be admissible, but in the present action it was irrelevant. The wire being there, the question as between the defendant and the plaintiff was whether there was negligence in not keeping it in proper repair.

The nonsuit, however, seems to have been entered on the ground of contributory negligence of the decedent. He was lawfully upon the roof in the exercise of his business. It is said that there was no evidence that it was necessary for him to go on the roof to do the painting. No such evidence was required. His convenience was reason enough. It was convenient for him to get at the cornice in that way and he had a right to do so. He found the wires in his way, and proceeded to prop them up so that he could work under them. Whether the means he took were such as a prudent man should have taken is not so clear that it can be determined by the court. If the weight of the wire when it fell on him had been such as to knock him into the street, that would have been so clearly his own negligence that the court could have said so as matter of law. But though he was bound to know in general the dangerous nature of such wires, and to use proportionate care in interfering with them, he was also entitled to presume from the general custom that they were properly insulated, unless the defect in their covering was visible to such examination as he ought to have made. All these considerations entered into the question of his negligence and made it one for the jury.

The case of *Smith v. East End Electric Light Co.*, 198 Pa. St. 545 19, 47 Atl. 1123, relied on by appellee, differed entirely from the present in the absence of evidence of notice to the company of the defect. The testimony which should

have been admitted here was sufficient to send that question to the jury.

Judgment reversed and procedendo awarded.

It is the Duty of Electrical Companies to exercise the utmost care to prevent injury to persons coming in contact with their wires. Whether this duty has been performed is ordinarily for the jury: *Perham v. Portland etc. Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 24. But see *Brush Elec. Light etc. Co. v. Lefevre*, 93 Tex. 604, 77 Am. St. Rep. 898, 57 S. W. 640; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922, 21 S. E. 733. If they fail properly to insulate their wires, and one lawfully on a roof engaged in work requiring him to risk coming in contact with the wires is injured, he is entitled to damages, and no presumption of contributory negligence will be indulged: *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51. See, also, *Brown v. Edison Elec. etc. Co.*, 90 Md. 400, 78 Am. St. Rep. 442, 45 Atl. 182; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801. Negligence in maintaining an electric wire may be inferred from the fact that its insulation is gone and it has been in this condition so long that the owners should have known it: *Griffin v. United Elec. Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675. And where an abrasion has been in existence for two years, the court will presume that it was known to the company: *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801.

BRODHEAD v. REINBOLD.

[200 Pa. St. 618, 50 Atl. 229.]

VENDOR AND VENDEE—STATUTE OF FRAUDS.—If an agreement for the sale of lands is reduced to writing and signed by the vendor alone, and delivered to the vendee, it is sufficient to take the case out of the operation of the statute of frauds, and it is not necessary that the notice of election to take by the vendee should be in writing. (p. 737.)

VENDOR AND VENDEE — PAROL EVIDENCE OF AGENCY.—If a contract for the purchase of land is made by a husband in his own name, the fact that he acted as agent for his wife may be shown by parol evidence. (p. 738.)

VENDOR AND VENDEE—HUSBAND AS AGENT OF WIFE—RECOGNITION OF AGENCY.—If a contract for the purchase of land is made by a husband in his own name while acting as agent for his wife, the fact that the vendor thereafter accepts payments from the wife on such contract for a long series of months will constitute a recognition by him of the wife as the real purchaser. (p. 739.)

VENDOR AND VENDEE—NOTICE OF EQUITABLE OWNER.—A person who takes conveyance to the legal title to land with knowledge that his grantor has agreed to sell it to another person,

takes it subject to the equitable estate already vested in the purchaser. (p. 739.)

VENDOR AND VENDEE—DEFERRED PAYMENTS.—A vendor who by his own acts has deprived himself of the power of fulfilling his contract of sale cannot require the vendee to make further payments to him. (p. 739.)

J. D. Brodhead and W. E. Doster, for the appellant.

H. C. Cope, for the appellee.

620 **POTTER, J.** The plaintiff in this action of ejectment was a purchaser at sheriff's sale of property sold under execution against one Edwin Laufer. The premises were conveyed by the legal plaintiff 621 to Catharine Ferriday, after the suit was brought, and her name was added to the record as use plaintiff. One of the defendants, Charles H. Reinbold, disclaimed title, and Nancy Reinbold, his wife, the other defendant, claimed as the equitable owner, under an article of agreement signed by Laufer, she having also given notice of her rights at the sheriff's sale. It appears from the record that the defendants took possession of the premises in dispute in September, 1886. On the 4th of October following articles of agreement for the sale of the premises were entered into "between Edwin Laufer, of the borough of South Bethlehem, etc., of the first part, and Charles H. Reinbold, of the same place aforesaid, stone-cutter, of the second part." This agreement was signed by Edwin Laufer, and "C. H. Reinbold, Agt."

Under the terms of the agreement, Laufer was to convey the premises "unto the said party of the second part, his heirs and assigns, . . . by a good and sufficient deed of conveyance, as soon as the sum of four hundred dollars is paid, exclusive of the building association mortgage hereinafter mentioned." The consideration named is "the sum of sixteen hundred dollars, one hundred dollars, part thereof, to be paid down on the execution of this agreement; three hundred dollars more thereof in marble or other stone and work, and twelve hundred dollars to be paid by assuming a bond and mortgage held by the Freemansburg Building and Loan Association, by the payment of dues and interest to said association, according to the rules of said association, as the same become due and payable." The agreement also contained this provision: "In default of complying with this agreement and its payments, the said C. H. Reinbold, his heirs or assigns, shall,

on a thirty days' previous notice, vacate the premises intended to be sold to the said E. Laufer, his heirs or assigns."

It was undisputed that Laufer has received the sum of nine hundred and seventy-five dollars, in installments of twelve dollars, in certain months between the years 1886 and 1896, the receipt for each installment, signed by Laufer, reciting that the money was "received from Mrs. C. H. Reinbold, . . . it being the monthly installment for six shares in the building and loan association at Freemansburg, which is to be transferred by Edwin Laufer to the said Mrs. C. H. Reinbold." It is also admitted that the sum of eighty dollars of the hand ⁶²² money was paid, but the payments in "stone and work" were disputed. Laufer conveyed the premises to his sons, W. P. and F. R. Laufer, on September 21, 1896, and took from them a mortgage for fourteen hundred dollars, which was afterward reduced to twelve hundred dollars, and, on December 30, 1896, was assigned to J. Davis Brodhead, the legal plaintiff, who, on April 12, 1897, assigned it to Catharine Ferriday, the use plaintiff. The sons reconveyed the premises to their father on September 11, 1897. On May 28, 1898, Edwin Laufer served a notice on defendants to vacate the premises within thirty days, for failure to comply with the terms of the written contract of sale. Executions were thereafter issued on judgments against Edwin Laufer, and the property was seized and sold by the sheriff to J. Davis Brodhead, who, as above stated, conveyed the property to Mrs. Ferriday after the suit was begun, the record being amended accordingly. On the trial Mrs. Reinbold was allowed to give parol evidence, against the objection of the plaintiff, to prove that her husband signed the agreement as her agent. The plaintiff asked for binding instructions, which were refused by the trial judge, and the question whether Mrs. Reinbold was the undisclosed principal in the agreement of sale was submitted to the jury as a question of fact. It was also left to them to determine the amount of unpaid balance of the purchase money due thereon. The jury, under further instructions from the court, returned a conditional verdict for plaintiff, to be set aside and entered for the defendant, Nancy Reinbold, if the latter pay into court the sum of eight hundred and seventy-five dollars, to be drawn out by the plaintiff only after she shall have filed with the prothonotary a deed in fee simple to said Nancy Reinbold, and a certificate that the mort-

gage on the property held by Mrs. Ferriday has been satisfied, and that there are no liens created by the plaintiff or Edwin Laufer upon the property.

Two questions are raised by this appeal: 1. Whether, under the statute of frauds, parol evidence was admissible to show that the husband signed the agreement of sale as the wife's agent; and 2. Whether the defendant had made such default in the payments as to forfeit the contract.

As far back as the case of *Lowry v. Mehaffy*, 10 Watts. 390, it was held that an agreement for the sale of land, reduced to writing and signed by the vendor alone, and delivered to ⁶²³ the vendee, is sufficient to take the case out of the operation of the statute of frauds. Justice Kennedy there says:

"The great object of the act was to prevent the owners of real estate from having their right in the same affected by means of parol evidence, unless to the extent of leases not exceeding a term of three years. Because, from long experience, it had been found that men, in many instances, had been defrauded of their rights in such estates by credit having been given to parol evidence wholly untrue either from want of accurate recollection, or from the misunderstanding or perjury of witnesses. It was, therefore, to protect the owners of such estates that the act was passed and couched in the terms that we find it; and, consequently, in order to meet and satisfy its design, an agreement, reduced into writing and signed by the owner of the estate, specifying the terms and conditions fully upon which he has agreed to part with any right in it, and at the same time delivered to and accepted by the other party, would seem to be sufficient without its being signed by the latter, to whom the owner agrees to pass the right. In the present case this was not only done, but the agreement was also partially carried into effect by the payment of nearly one-fourth of the purchase money, and the delivery of the possession of the property sold to the vendees by the vendor. We therefore consider that the vendor in such case may, by action against the vendee, compel the payment of the residue of the purchase money; and, on the other hand, if the vendee voluntarily pays or tenders the residue of the purchase money, he may hold the property in the same manner as if it were conveyed to him according to the terms of the agreement."

The authority of this case is unshaken. It has been uniformly followed since: See *Witman v. City of Reading*, 191

Pa. St. 140, 43 Atl. 140, and cases there cited. The question there ruled cannot, in any sense, be now considered an open one. It is true that the agreement must be between the parties or their agents, yet it is sufficient that a contract be signed by the vendor, and it is not necessary that notice of election to take by the vendee should be in writing: *Smith & Fleek's Appeal*, 69 Pa. St. 474. And where a contract for the purchase of land is made by one in his own name, the fact that he was the agent of an undisclosed principal may be shown by parol evidence: *Hall v. White*, 123 Pa. St. 95, 16 Atl. 521.

This latter case also recognizes the principle that acceptance of the benefits of an agreement is such ratification as is equivalent to an express affirmance of its terms.

It cannot be doubted that Laufer recognized Mrs. Reinbold as the real party in interest, by accepting the payments from her, under the contract, through a long series of months.

In *Yerkes v. Richards*, 153 Pa. St. 646, 34 Am. St. Rep. 721, 26 Atl. 221, it was held that where a contract is signed by the grantor alone, and the person in whose favor the option is made is a married woman, although she be an undisclosed principal, yet the agreement is binding, and will not fail for lack of mutuality. In that case, as in the one at bar, the contract was only partially executed. As a rule, the possession by the vendee, under articles, is notice to third persons that he is the equitable owner of the land contracted to be conveyed, and that his vendor holds the legal title in trust for him: *White v. Patterson*, 139 Pa. St. 438, 21 Atl. 360. In the present case there was not only possession by the defendant, but actual notice that she claimed title. This brings the present plaintiff under the rule laid down in *Riel v. Gannon*, 161 Pa. St. 289, 29 Atl. 55, where it is held that one who takes the conveyance of the legal title to land, with knowledge that his grantor has agreed to sell it to another person, takes it subject to the equitable estate already vested in the purchaser.

As to the question of forfeiture by default, it clearly appears that the vendor had, by his own acts, deprived himself of the power of fulfilling his contract. He undertook to ignore entirely his agreement with the defendant, and conveyed the property to his sons. After this he was not in condition to comply with the terms of the contract of sale, and the

vendee could not be required to make further payments to him.

We are clear that, under all the authorities the rulings of the learned trial judge, with respect to the contract, and upon the admission of evidence, were justified. The result of the trial was substantial justice. None of the specifications of error are sustained, and the judgment is affirmed.

Statute of Frauds.—It is not essential that both parties sign the contract or memorandum necessary to satisfy the statute of frauds. It is sufficient, in a suit or cross-bill against the vendor of land for specific performance, to show that he signed the contract of sale, for the vendee becomes bound thereby and renders the contract mutual when he brings suit for specific performance or takes possession under the contract: *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885. A memorandum signed by the vendor acknowledging the receipt of a deposit on account of the purchase price satisfies the statute, though not signed by the vendee: *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280. And an option to purchase land signed by the vendor alone may be enforced by the vendee: *Idle v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695.

A Vendee Acquiring Title to Land with notice of a pre-existing contract of sale made by the vendor is bound thereby: *Tate v. Pensacola Gulf etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 South. 542.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

STATE v. ZOPHEY.

[14 S. Dak. 119, 84 N. W. 391.]

INTERSTATE COMMERCE.—NO STATE CAN IMPOSE upon the products of other states, or upon their transportation, or upon citizens engaged in the sale thereof, more onerous public burdens than it imposes upon like products of its own territory. (p. 744.)

INTERSTATE COMMERCE.—A STATUTE IMPOSING A LICENSE FEE upon wholesale liquor dealers whose products are manufactured without the state, and imposing a manufacturing license upon the manufacturers of liquors within the state but exempting them from the wholesale dealer's license, the latter license being more onerous than the manufacturer's, conflicts with the commerce clause of the federal constitution. (pp. 742, 745.)

E. L. Taubman and L. W. Crofoot, for the plaintiff in error.

John L. Pyle, attorney general, and J. H. Perry, state's attorney, for the defendant in error.

120 CORSON, J. Upon an information filed by the state's attorney of Brown county, charging the plaintiff in error with the crime of selling malt and brewed liquors at wholesale without a license, he was tried and convicted, and brings the proceeding before this court for review upon writ of error. It appears from the evidence on the part of the prosecution that the plaintiff in error was the agent of the Theodore Hamm Brewing Company, a corporation organized **121** and existing under the laws of the state of Minnesota, and having its principal place of business at St. Paul, in that state; that subsequent to the first day of July, 1899, he was engaged in soliciting orders for malt and brewed liquors for that corporation:

and that the orders were filled by shipping the products of the brewery to a warehouse owned by said corporation, located at Aberdeen, in said Brown county, and from there delivered to the various customers from whom orders had been taken. The state's attorney admitted that the brewing company was a corporation having its manufactory located in the city of St. Paul, in the state of Minnesota, and that the only beer that was in the warehouse at Aberdeen was the product of the manufactory of said company at St. Paul. Thereupon the plaintiff in error moved the court to advise the jury to return a verdict of not guilty, upon six grounds, the fifth of which, and the only one we shall consider, is as follows: "Because the law under which the information is framed, being chapter 72 of the Laws of South Dakota for the year 1897, so far as it relates to nonresident manufactures, is unconstitutional, in that it makes an unjust discrimination against nonresident manufacturers of brewed and malt liquors, and is contrary to the provisions of the constitution of the United States in reference to the control of commerce between the states, for the reason that said act imposes no wholesale dealers' tax or license upon the product of beer manufactured within this state." The court denied the motion, and subsequently the question of the constitutionality of the law was raised by requests on the part of the plaintiff in error to instruct the jury, which were also denied, and by exceptions to the instructions given.

It is contended on the part of the plaintiff in error that that part of the law requiring a wholesale dealer in malt and brewed liquors not manufactured within this state to pay a license fee of six hundred dollars, while ¹²² the wholesale dealer and manufacturer of liquors within this state is not required to pay a license for selling the same at wholesale, is an unjust discrimination against dealers whose manufactories are situated in other states, and is in violation of section 8 of article 1 of the constitution of the United States, and that that part of the act is therefore void. It is provided by section 1 of the act entitled "An act to provide for the licensing, restriction, and regulation of the business of the manufacture and sale of spirituous and intoxicating liquors," approved March 3, 1897 (being chapter 72 of the Session Laws of 1897), that: "In all townships, precincts, towns, and cities of this state there shall be annually paid

the following license upon the business of manufacturing, selling, or keeping for sale by all persons whose business in whole or in part consists in selling or keeping for sale or manufacturing in this state distilled, brewed, or malt liquors, or mixed liquors, as follows: Upon the business of selling only brewed or malt liquors at wholesale six hundred dollars (\$600) per annum, said license to be paid in each township, precinct, town, or city in which said wholesaler has or operates a warehouse or depository; upon the business of manufacturing brewed or malt liquors for sale four hundred dollars (\$400) per annum. . . . No person, firm, or corporation paying a manufacturer's license in this state on brewed or malt liquors under this act shall be liable to pay a wholesale dealer's license on the product of such manufactory. A person, firm, or corporation shall pay the license herein provided in as many different places as he carries on business." By section 5 of the act severe penalties are provided for the violation of the provisions of said section 1. It will be noticed by the provisions of section 1 that any person engaged in the manufacture in this state of brewed or malt liquors who shall have paid the license therefor of ¹²³ four hundred dollars is not required to pay any wholesale dealer's license, and that under the act he may establish as many warehouses within the state as he may desire, without the payment of any wholesale dealer's license, while a party who manufactures brewed or malt liquors without the state, and desires to establish warehouses and wholesale establishments within the state, is required to pay a license fee of six hundred dollars in every precinct, town, and city in which he may establish such warehouse or depository for the sale of such brewed and malt liquors. Thus it will be seen that the law favors the home manufacturer, and imposes a burden upon parties manufacturing without the state not imposed upon home manufacturers. To repeat, the home manufacturer, after paying his manufacturer's license of four hundred dollars, may open warehouses or depositories for wholesale in every precinct, town and city within the state without the payment of any further license fee, while the manufacturers without the state are required to pay a license fee of six hundred dollars in every precinct, town, and city within the state in which they may establish a wholesale warehouse or depository. To prevent such discrimination the constitution of the

United States provides: "The Congress shall have power: To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; to make all laws which shall be necessary and proper for carrying into execution the foregoing powers": U. S. Const., art. 1, sec. 8. One great objection to the operation of the government under the articles of confederation was that it left the several states with the power to impose burdens upon interstate commerce, and to discriminate in favor of their own citizens as against the citizens of other states, and it was this power thus to discriminate, more than any other, that induced the people of the states to abrogate the articles of confederation and establish in their place the present constitution, in which the power is given to ¹²⁴ Congress to regulate commerce, not only with foreign nations, but among the several states. In one of the early cases in which this clause of the constitution was involved, Mr. Webster, in addressing the court, said: "Over whatever other interests of the country this government may diffuse its benefits and blessings, it will always be true, as a matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system." This section of the constitution has received as much consideration from the courts as, and perhaps more than, any other one section of that instrument; for the history of the decisions of the supreme court of the United States conclusively shows the tendency of the state governments to discriminate in favor of their own citizens as against the citizens of other states. It seems to be well established that any discrimination made by a state in favor of its domestic products, manufactured or grown within the state, as against the products of other states, amounts to a regulation of interstate commerce, whether the state claims to be acting under its police power or under its power of taxation, and is a violation of the clause of the constitution we are now considering. In *Guy v. Baltimore*, 100 U. S. 434, the supreme court of the United States, after reviewing the decisions upon this subject previous to that time, speaking by Mr. Justice Harlan, said: "In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the federal constitution, impose upon the products of other states, brought

therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory." The rule as here stated has been steadily and ¹²⁵ uniformly adhered to by the supreme court of the United States: *Welton v. Missouri*, 91 U. S. 275; *Cook v. Pennsylvania*, 97 U. S. 566; *Guy v. Baltimore*, 100 U. S. 434; *Tiernan v. Rinker*, 102 U. S. 123; *Webber v. Virginia*, 103 U. S. 344; *Walling v. People*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. Rep. 655; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862; *Brimmer v. Redman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 11 Sup. Ct. Rep. 855; *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. Rep. 214; *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. Rep. 262. *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725, was a case very analogous to the case at bar. The state of Michigan had passed a law providing for licensing wholesale dealers in malt and brewed liquors, requiring a license therefor of three hundred dollars, and a license upon the business of manufacturing brewed and malt liquors within the state for sale of sixty-five dollars per annum. The manufacturer of brewed and malt liquors made outside of the state of Michigan could not introduce his liquors into the hands of the consumers without becoming subject to this wholesale dealer's tax of three hundred dollars per annum in every township, village, and city where he attempted to do business. The manufacturer within the state, however, was required to pay only the manufacturer's tax of sixty-five dollars per annum, and was then exempt from paying the tax imposed upon the wholesale dealer. In that case the court, speaking by Mr. Chief Justice Fuller, said: "We have repeatedly held that no state has the right to lay a tax upon interstate commerce in any form, whether by way of duties laid upon the transportation of the subject of that ¹²⁶ commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden upon that commerce, and amounts to a regulation of it, which belongs solely to Congress. . . . It devolves upon Congress to indicate such ex-

ceptions as in its judgment a wise discretion may demand under particular circumstances. Lyng was merely the representative of the importers, and his conviction cannot be sustained, in view of the conclusions at which we have arrived."

We shall not attempt to review the many cases that have been decided, bearing upon this question, as the case at bar presents so clearly a case of unjust discrimination against the citizens of other states that the further discussion of it seems entirely unnecessary. We are of the opinion that that part of the act referred to, imposing a license fee upon wholesale dealers whose products are manufactured without the state, is clearly in conflict with the provisions of the United States constitution, and is therefore void. The plaintiff in error, acting as the agent of the brewing company in soliciting orders for that company, committed no offense against the laws of the state, and the motion made at the close of the state's evidence should have been granted by the court.

The judgment of the circuit court is reversed, and that court is directed to discharge the plaintiff in error from further custody.

Interstate Commerce.—A statute imposing a tax on persons engaged in selling, or soliciting orders for the sale of, liquors to be shipped into the state, and not imposing a like tax on persons engaged in a like business in reference to liquors manufactured within the state, is unconstitutional: See the monographic note to *People v. Wemple*, 27 Am. St. Rep. 558.

ROSS v. WARD.

[14 S. Dak. 240, 85 N. W. 162.]

SLANDER.—A COMMUNICATION MAY BE PRIVILEGED and not constitute slander, though it charges one with crime. (p. 749.)

SLANDER—ACCUSING OF CRIME.—A CHARGE OF THE COURT that an elector is not at liberty to accuse a party of crime under any circumstances, unless he can justify it by proving the truth of the charge, is erroneous. (p. 749.)

SLANDER.—A COMMUNICATION BONA FIDE upon any subject in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminal matter which without the privilege would be slanderous. (p. 750.)

SLANDER—QUESTION OF PRIVILEGE.—AN INSTRUCTION, in an action for slander for accusing one of crime, omitting the question of privilege, and assuming, in effect, that the defendant admits in his pleadings that the charge was false and that he knew it to be false when he makes no such admission, is erroneous. (p. 751.)

SLANDER—PROVINCE OF COURT AND JURY.—The court may direct the jury by stating to them what constitutes a privileged communication as laid down by the law, but whether or not the communication is privileged is a matter for the jury. (pp. 751, 752.)

SLANDER—CANDIDATE FOR OFFICE.—An elector and taxpayer is justified in stating to other electors and taxpayers that a candidate for alderman is a thief, if he makes the statement in good faith, without malice, and in a belief, with reason therefor, of its truth. (p. 752.)

John Wood and A. W. Burt, for the appellant.

H. C. Hinckley, for the respondent.

²⁴¹ CORSON, J. This is an action for slander. Verdict and judgment for the plaintiff, and the defendant appeals. It is averred in the complaint that on the first day of April, 1899, the following defamatory words were spoken by the defendant of and concerning the plaintiff: "Van Ross is a thief." In his second count it is averred that on the twenty-fourth day of April the defendant again used substantially the same language of and concerning the plaintiff, and that this was repeated on the twenty-fifth day of April. The defendant in his answer does not attempt to justify by averring that the statements made by him were true, but he does aver in his answer that in making the statements in the plaintiff's complaint mentioned the defendant believed them to be true at the time he made them, and he gives in detail the circumstances under which two head of cattle were lost by him in October, 1898, and the grounds upon which he based his belief that the plaintiff had stolen them. The defendant, as his third defense, alleged that the plaintiff was a candidate for the office of alderman for the first ward of the city of Huron, at the city election to be held in April, 1899, and was competing with other candidates for said office; that the contest therefor became exciting, and the electors became interested in said election; that in a conversation with one ²⁴² David Smith, who was an elector and taxpayer of said first ward, on or about April 1, 1899, a short time before said election, the defendant, in discussing the merits and fitness for the office of alderman of the plaintiff and the other candidates,

made the statement set forth in the complaint, in the interest and for the benefit of the taxpayers of the city of Huron and the community at large, and that the language was used by defendant in a private conversation with said Smith and one J. S. Burke, electors and taxpayers of said city, in which the defendant is an elector, property holder, and taxpayer and interested in the election of aldermen and other officers of said city. As a fourth defense, the defendant avers that the statements made by him on or about April 24th, in regard to the plaintiff, were called out by the questions and conduct of the plaintiff himself. The defendant further avers that whatever he said of and concerning the plaintiff was said in the full belief of its truth and verity, and was said to parties interested as to the plaintiff's qualifications and fitness for office, and the defendant denies each and every allegation contained in said complaint not specifically admitted.

It will thus be seen that the defendant admits the statements alleged in the complaint to have been made by him on the 1st of April, 1899, and on the 24th of the same month; that he pleads the fact and circumstances attending the loss of his cattle in mitigation of damages; that he avers as a defense that the statements made by him on the first day of April were made of and concerning the plaintiff while he was a candidate for the office of alderman of the city of Huron, and to parties who were taxpayers and electors of said city, and interested with himself in the officers to be elected at the then ensuing election, to be held on the sixth day of the same month; that the statements made of and concerning the plaintiff on the twenty-fourth day of April were made in the heat of passion, and in refutation of the ²⁴³ abusive language used to him by the plaintiff; and that he further avers that whatever he said of and concerning the plaintiff was said in the full belief of its truth and verity, and not from any motive of malice toward the plaintiff; and that all the allegations of the complaint not specifically admitted are denied. Numerous errors are assigned by the appellant, but in the view we take of the case, it will only be necessary to discuss those relating to the charge of the court to which the defendant excepted.

The court in its charge to the jury used the following language: "Thus you will see that, while considerable latitude is allowed in discussing the fitness of a candidate for office, yet the law is that voters and newspaper publishers are not at

liberty to attack the private character of the individual, and falsely accuse him of having committed a crime against the laws of the state, and, if he does so, the only defense he will have is by proof of the truth of the charges he makes. Thus you will see, gentlemen, the plea of privilege falls to the ground. It is not sufficiently broad to constitute a defense." It will be observed that in this portion of the charge the court took the whole question of privilege from the jury, and held as matter of law that an elector is not at liberty to attack the private character of an individual, and falsely accuse him of having committed a crime against the laws of the state, though he make the charge in good faith, believing it to be true, and under circumstances making it privileged. In taking this view of the law, the court was clearly in error. The Civil Code of this state provides: "Slander is a false and unprivileged publication, other than libel, which (1) charges any person with crime or with having been indicted, convicted or punished for crime": Comp. Laws, sec. 2529. It will be observed that the communication must be "false and unprivileged." The clear inference from this section is that a communication, though ²⁴⁴ it charges a person with crime, may yet be privileged and not constitute slander. The learned circuit court evidently overlooked this section of our code, and followed the decisions of certain courts which hold that, if a person is charged with a crime, it is not privileged; but under our code the law is otherwise, and a person may be charged with a crime, and, if the communication is privileged, he may not be liable in damages therefor. The code also provides that "a privileged communication is one made (3) in a communication, without malice, to a person interested therein, by one who is also interested": Comp. Laws, sec. 2530. It will be noticed that in this definition no exception is made as to the communication charging a crime, the only condition being that the communication be without malice, and made to a person interested therein, by one who is also interested. The charge of the court, therefore, that an elector is not at liberty to accuse a party of having committed a crime against the laws of the state under any circumstances, unless he can justify by proving the truth of the charge, has no warrant under our code. This was the view taken by this court in the recent case of *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72, 84 N. W. 237. The learned circuit court in that case used substantially the same language as

that used by the court in the case at bar, and for the error in the instruction the judgment was reversed, and a new trial granted: *Meyers v. Longstaff*, 14 S. Dak. 98, 84 N. W. 233.

In the very recent case of *McCarty v. Lambley*, 20 App. Div. 264, 46 N. Y. Supp. 792, the supreme court of New York uses the following language: "Privileged communications have been defined by a text-writer to comprehend all statements made bona fide in the performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. A communication made bona ²⁴⁵ fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminary matter, which, without the privilege, would be slanderous and actionable: *Townshend on Slander and Libel*, sec. 209. The rule as thus stated has been frequently recognized and adopted by the courts of this state: *Keane v. Sprague*, 30 Alb. L. J. 283; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Byam v. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. 75; *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342; *Pendleton v. Hawkins*, 11 App. Div. 602, 42 N. Y. Supp. 626. When therefore, we speak of them as 'privileged,' we simply mean that the circumstances in which they are used rebut the inference which would otherwise arise from their utterance; or, in other words, that when their privileged character is established as a matter of law, the burden is cast upon the plaintiff of establishing, as a matter of fact, the existence of express malice." The court in that case concludes: "We incline to the opinion, therefore, that the parties' relation toward each other was legally such as to bring any communications or statements made by either within the same rule to which we have already adverted (*Billings v. Fairbanks*, 136 Mass. 177); or, to state the matter more concisely, that the statements made to Mara were privileged, to the extent of requiring proof of express malice, in order to render them actionable." In the case of *Fresh v. Cutter*, 73 Md. 87, 25 Am. St. Rep. 575, 20 Atl. 744, which was an action for slander in which the defendant charged the plaintiff with having stolen two hundred dollars from him, it was said: "Malice is the foundation of the action, and in ordinary cases is implied from the slander, but there may be justification from the occasion, and,

when this appears, an exception to the general rule arises and the words must be proved to be ²⁴⁶ malicious as well as false: *Beeler v. Jackson*, 64 Md. 593, 2 Atl. 916. This justification from the occasion arises, in the class of cases now being considered, when a communication is 'made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a party having a corresponding interest or duty,' although the communication contained criminating matter which, without this privilege, would be slanderous and actionable." In the case at bar, for the error committed by the court in the part of the instruction quoted, the judgment must be reversed. But, as the questions arising upon the other portions of the charge may arise on another trial, we have deemed it proper to consider them in this opinion.

The court also charged the jury as follows: "Now, gentlemen, from all I have said in this case regarding the question of this definition that a slander is a false and unprivileged publication, other than libel, which charges any person with crime, or with having been indicted, convicted, or punished with crime, you will see that by the pleadings in this case it is admitted that this charge was made on at least two occasions, charging this plaintiff with being a thief. It is admitted by the pleadings and must be taken that this charge is false, and it necessarily follows that this plaintiff is entitled to a verdict for some amount, and the only question the jury will have to determine is the amount of damages that the plaintiff is entitled to recover in this case." The learned judge was clearly in error in giving this instruction. It will be noticed that the instruction entirely omits the question of privilege, and it assumes, in effect, that the defendant had admitted that the charge was false, and that he knew that it was false at the time it was made. This is not the correct construction of the pleading. The defendant denies all the allegations of the complaint not expressly admitted in the answer, and ²⁴⁷ he nowhere has admitted in his answer that the charge made by him was false, or that he knew it was false at the time it was made. The court, therefore, stated the effect of the answer too strongly to the jury, and in ignoring the question of privilege was clearly in error. In *Fresh v. Cutter*, 73 Md. 87, 25 Am. St. Rep. 575, 20 Atl. 744, the supreme court of Maryland held a similar instruction to be erroneous because it omitted all reference to

the question of privilege. The court in that case said: "It directed the jury to find for the plaintiff if they believed the defendant spoke the words in the presence and hearing of other persons than the plaintiff. Under this instruction the jury were required to return a verdict against the defendant, even though they were satisfied that the words were spoken to Allen alone, in good faith, without malice, in the full belief of their truth, and under the honest conviction that Fresh was only discharging a social duty to his neighbor in making the communication. This entirely ignored the question of privilege, which was the only defense relied on by the appellant." It is true in this case that the court had assumed to decide that the communications made either on April 1st, the 24th, or the 25th, were not privileged, but in this view we think the court was in error. Section 5, article 6 of our state constitution is as follows: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right. In all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense. The jury shall have the right to determine the facts and the law, under the direction of the court." The fact that the jury shall have the right to determine the fact and the law under the direction of the court seems to have been overlooked by the learned circuit court. The court, it is true, may direct the jury by stating to them what constitutes a privileged communication as laid down in the law, but whether or not the communication is privileged ²⁴⁸ is a matter to be determined by the jury. This provision of the South Dakota constitution is self-executing. To the lawyer familiar with the early decisions of the English courts upon the subject of libel and slander, the importance of this provision will be apparent. In our view of the case, therefore, the court had no right to take from the jury the question of whether or not the communication in this case was privileged.

Again, the court charges the jury: "The damages in this case which the plaintiff should recover may be anywhere from one dollar up to five thousand dollars, but in no case should exceed five thousand dollars, because that is the amount alleged. The plaintiff must, of necessity, as I have said, recover some damages—at least nominal damages. These damages I have been speaking to you of are termed 'actual' or 'compensatory' damages, and are such damages as, in the judgment of

the jury, will compensate the injured party for the injury he has sustained." It will be seen that in this instruction the court entirely ignores the question of privileged communication, and instructs the jury that they must find for the plaintiff in some amount, leaving only the amount of damages for the jury to find. This, as we have seen, was clearly error. It clearly appears from the evidence in this case that when the first alleged defamatory words were uttered on the 1st of April, the plaintiff was a candidate for the office of alderman, and the defendant and the parties to whom the statements were made were taxpayers and electors of the city of Huron, who necessarily had an interest in the election of aldermen in that city. If the defendant, therefore, in good faith, with proper motives and without malice, stated to the persons named that the plaintiff was an unfit person to be elected as alderman, for the reason that he had taken the cattle of the defendant, and the defendant honestly believed, and had reason to believe, that his cattle had been ²⁴⁹ stolen by the plaintiff, he was fully justified in making those statements at that time to the persons named: *Myers v. Longstaff*, 14 S. Dak. 98, 84 N. W. 233; *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72, 84 N. W. 237.

The repetition of these statements on the 24th of April and after the election had been held presents a question of more difficulty. It would seem from the evidence, however, in the case, that it tended very strongly to show that the statements made by the defendant on the 24th of April were called out by inquiries made by the plaintiff. But we do not deem it necessary at this time to decide the question as to whether or not the defendant has furnished any legal excuse for the statements made by him on that occasion and on the following day, assuming that the statements were made on the 25th, as stated by the witness.

The judgment of the circuit court and order denying a new trial are reversed and a new trial granted.

A Communication is Privileged when made in good faith upon any subject in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding duty or interest. And this although it contains criminal matter: *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810; *Rothholz v. Dunkle*, 53 N. J. L. 438, 26 Am. St. Rep. 432, 22 Atl. 193; *Trebbv v. Transcript Pub. Co.*, 74 Minn. 84, 73 Am. St. Rep. 330, 76 N. W. 961. In regard to matters of public interest, all that is necessary to render the words spoken or published privileged is, that they should be communicated in good faith, without malice, Am. St. Rep., Vol. LXXXVI—48

to those who have an interest, and in a belief, founded upon reasonable grounds, that the communication is true: *Bearce v. Bass*, 80 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411.

Libel and Slander of Candidate for Office.—A candidate for public office puts his character in issue so far as respects his fitness and qualification: *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810; *Belknap v. Ball*, 83 Mich. 583, 21 Am. St. Rep. 622, 47 N. W. 674. But false statements defamatory of the character of a candidate, although made in good faith, have been held not privileged: *Smith v. Burrus*, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881. As to the liability for imputing crime to a candidate for office, see *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810; *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170, 21 South. 109; *State v. Haskins*, 109 Iowa, 656, 77 Am. St. Rep. 560, 80 N. W. 1063; *Squires v. State*, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147; *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. Rep. 583, 26 S. W. 1020; monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 353-357.

Libel.—The Relative Province of the court and jury in prosecutions for libel is discussed in the note to *State v. Syphrett*, 13 Am. St. Rep. 625-628.

BROWN v. TIDRICK.

[14 S. Dak. 249, 85 N. W. 185.]

ATTACHMENT BOND—ASSIGNMENT OF ACTION.—If the plaintiff in attachment, after giving an undertaking, assigns the cause of action and the assignee is substituted as plaintiff, the sureties continue liable. And, before proceeding against them for the costs, it is not necessary to show a judgment against the original plaintiff or an attempt to collect the costs from him or his estate. (pp. 755, 758.)

ATTACHMENT BOND.—THE TERM "COSTS" in a statute providing for an undertaking in attachment conditioned that "if the defendant recover judgment, . . . the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment," means the costs of the action in which the attachment is issued, and is not limited by the phrase "by reason of the attachment." (p. 758.)

ATTACHMENT BOND.—IT IS PRESUMED, IN FAVOR OF A JUDGMENT on an undertaking in attachment, that a proper affidavit for attachment was filed with the clerk, if it is stated in the complaint that the plaintiff made an application for a warrant of attachment and the warrant was issued. (p. 759.)

ATTACHMENT BOND.—IN AN ACTION on an undertaking in attachment, the parties are estopped to question the regularity of the attachment. (p. 759.)

ATTACHMENT BOND.—THE COMPLAINT, IN AN ACTION on an undertaking in attachment, need not set out the proceedings in the attachment. (p. 759.)

B. C. Huddle and S. H. Wright, for the appellant.

James Brown, for the respondent.

²⁵¹ CORSON, J. This is an action upon an undertaking for attachment. The defendant interposed a demurrer to the complaint, and, the demurrer being overruled and the defendant electing to stand upon his demurrer, judgment was entered in favor of the plaintiff, and from this judgment the defendant appeals.

Plaintiff's cause of action may be summarized as follows: In August, 1896, an action was commenced in the circuit court of Brule county by one M. E. Distad against Harry A. Shanklin for the recovery of money, wherein said Distad applied for a writ of attachment against said defendant Shanklin, and wherein said Distad and C. D. Tidrick executed and filed with the clerk of said court for the benefit of the defendant in said action, a written undertaking as required by statute, which was in the usual form. This undertaking, among other things, provided that if the defendant Shanklin should recover judgment against the plaintiff, or if the attachment to be issued should be set aside by order of the court, the said Distad, as plaintiff, and said Tidrick undertook, promised, and agreed to and with said defendant that the said plaintiff should and would pay all costs that might be awarded to said defendant, and all damages that he might sustain by reason of the attachment, not exceeding the sum of one thousand dollars; that, pursuant to said application and undertaking, the clerk of said circuit court issued a writ of attachment in the usual form; that, pursuant to said attachment, the sheriff of said Brule county attached real property belonging to the defendant Harry A. Shanklin situated in said county; that while said action was pending ²⁵² and said attachment remained in force, the plaintiff therein, M. E. Distad, died, and thereafter his widow, Mary Distad, made application to the court to be substituted as plaintiff in his stead, alleging that in December, 1896, and before said M. E. Distad died, he assigned to her his right and interest in the cause of action, and she was thereupon substituted as plaintiff in said action; that thereafter such proceedings were had in such action that the defendant therein, Harry A. Shanklin, in January, 1899, recovered judgment against the plaintiff therein, said Mary Distad dismissing the action upon the merits, and for the sum of one hundred and six dollars and sixty-five cents costs; that afterward said Mary Distad made application for a new trial, which was denied, and the court made an order vacating and setting

aside said attachment, and directing the cancellation of the notice of the pendency of the action; that on March 23, 1899, an execution was issued upon said judgment against said Mary Distad, and returned unsatisfied; that plaintiff has at different times since said judgment for costs was entered demanded of the plaintiff in that action the payment of said judgment in accordance with the terms of the undertaking, and that she has refused and still refuses to pay the same, or any part thereof; that on March 21, 1900, said judgment was by an instrument in writing duly assigned and transferred to the plaintiff herein, and duly filed in the office of the clerk of said court, and entered in the judgment-book of the same. Plaintiff therefore demands judgment against said defendant for the sum of one hundred and six dollars and sixty-five cents, with interest, etc., and for the costs of the action. The demurrer to the complaint was made upon the ground that the same did not state facts sufficient to constitute a cause of action.

The appellant, in his brief, states specifically the grounds upon which he relies, as follows: "1. The undertaking made the basis of this action was executed by appellant as surety for M. E. ²⁵³ Distad, the original plaintiff in the action against Shanklin, and not for Mary Distad, the substituted plaintiff in the action; 2. The undertaking was not conditioned, nor is appellant liable thereunder, for the costs of the action; 3. The complaint does not show what costs, if any, were incurred during the time that appellant's principal was plaintiff; 4. The same does not show any judgment against his principal; 5. There is no allegation that any effort has ever been made to collect the costs from the estate of the principal in the undertaking, nor is there any averment of the insolvency of his estate; 6. There is no allegation that any affidavit for attachment was ever made, nor any facts stated showing that the clerk had jurisdiction to issue the writ of attachment; 7. The complaint affirmatively shows that the substituted plaintiff was at all times after she became a party a resident of the state of Iowa." It will be observed that the first position taken by appellant is that, inasmuch as the undertaking was executed as security for M. E. Distad, the original plaintiff, and not for Mary Distad, the substituted plaintiff, the action cannot be maintained. This, we think, is placing too limited a construction upon the condition of the undertaking. The section under which the undertaking was given reads as follows: "Before

issuing the warrant, the clerk must require a written undertaking on the part of the plaintiff, with sufficient surety to the effect that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum named in the undertaking, which must be at least the amount of the claim specified in the affidavit, and in no case less than two hundred and fifty dollars": Comp. Laws, sec. 4996. While it is true that the undertaking is given on the part of the appellant that the plaintiff will pay all costs that may ²⁵⁴ be awarded to the defendant, etc., still we are of the opinion that the plaintiff here spoken of is any plaintiff that may legally become such during the pendency of the action. In case of the death of the plaintiff who institutes the action, it would hardly be contended that the administrator or executor might not properly be substituted, and that the judgment against such administrator or executor so substituted would, in effect, be a judgment against the plaintiff; and we think the same reasoning should apply to the substitution of a plaintiff by assignment made by the original plaintiff. The object and purpose of the undertaking is to protect the defendant against costs and damages by reason of the attachment. The fact, therefore, that the original plaintiff has ceased to be such, and that a third party has been substituted as plaintiff in his stead, cannot be permitted to defeat the object and purpose of the statute. While no case directly in point has been called to our attention, cases quite analogous have arisen in which it has been held that the fact that there was a change in the parties did not affect the right of a party to recover on his undertaking. In *Slosson v. Ferguson*, 31 Minn. 448, 18 N. W. 281, it was held that where a plaintiff, to whom a bond on release of the attachment had been executed, had assigned the same pursuant to the statute for the benefit of creditors, and the assignee was substituted as plaintiff in the action, and procured judgment therein, the obligors in the bond became liable to the assignee thereon; and the court in its opinion said: "The bond is such as the statute prescribes. As is contemplated by the statute, the bond was executed personally to the plaintiff in a specified action. In that part of the statute prescribing the condition the words 'the plaintiff' refer to the same person named as obligee. In this connection the import of the

words 'the plaintiff' and 'said plaintiff' in the bond is the same; but, while the obligation is in terms assumed only in favor of a particular ²⁵⁵ person, it is to be construed in connection with existing law pursuant to which it is made, and with regard to the objects plainly sought to be accomplished by the bond executed in compliance with the statute. . . . The statutory security which took the place of the attached property went along with the action as continuing security notwithstanding the transfer of the cause of action, and the consequent substitution of parties, by means of which the real party in interest was retained as plaintiff." So we may say in the case at bar the undertaking which was given as security to the defendant necessarily went along with the action as continuing security notwithstanding the transfer of the cause of action. It was not in the power of the defendant to prevent the substitution, as the plaintiff Mary Distad had a legal right to be substituted in place of her deceased husband, the cause of action being one that survived, notwithstanding his death. We are clearly of the opinion, therefore, that the position of the appellant upon this point is not tenable, and that the surety continued liable as such surety for the lawful plaintiff in the action at the time the judgment was recovered against her by the defendant: *Cockroft v. Clafin*, 64 Barb. 464, affirmed in 53 N. Y. 618; *Gilmore v. Crowell*, 67 Barb. 62; *Bell v. Walker*, 54 Neb. 222, 74 N. W. 617.

The appellant further contends that the undertaking was not conditioned, nor the appellant liable thereunder, for the costs of the action. It will be noticed that by the provisions of section 4996, above quoted, one of the conditions of the undertaking is required to be that, "if the defendant recover judgment, . . . the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment." The undertaking in this action, it will be observed, was drawn in conformity with the statute. The theory of the appellant seems to be that ²⁵⁶ the term "costs," as used in the statute, is qualified by the term "by reason of the attachment," and does not refer to the ordinary costs of the action; but this contention is not tenable. "The costs," as used in the statute, means the costs of the action in which the attachment is issued, and is not qualified by the expression, "by reason of the attachment." That qualification applies only to the damages that may be recovered. This section of our code

is the same as section 640 of the Code of Civil Procedure of the state of New York, requiring undertakings on attachment, except that "clerk" is substituted for "judge." In the case of *Lee v. Homer*, 37 Hun, 634, the supreme court of that state gave a similar construction to this section, and held that the sureties upon an undertaking given upon the issuing of an attachment are liable for the costs of an action awarded to the defendant upon the dismissal of the complaint, even though the attachment itself be never formally vacated; and they further held that the words, "which he may sustain by reason of the attachment" apply only to the word "damages," and not to the words "costs which may be awarded to the defendant." It was contended in that case, as in this, that the surety was not liable for the costs of the action itself, but, as we have seen, that learned court held otherwise; and this decision was affirmed by the court of appeals of New York in a memorandum opinion: *Lee v. Homer*, 109 N. Y. 630, 15 N. E. 896.

The third, fourth, and fifth points made by counsel for the appellant are not of sufficient merit to require an extended consideration. The defendant, as we have seen, was entitled to all the costs incurred by him in the action, and it was not material what portion was incurred by the original plaintiff, or what was incurred by the substituted plaintiff. And for the reasons above stated it was not necessary to show a judgment against the original plaintiff. Nor was it necessary that any effort should have been made to collect the ²⁵⁷ costs from the estate of the principal in the undertaking, as it affirmatively appears from the record that Mary Distad was properly substituted as plaintiff, and the real party in interest, and was, therefore, primarily liable for the costs of the action.

It is further contended on the part of the appellant that there was no allegation that any affidavit for attachment was even made, nor any facts stated showing that the clerk had jurisdiction to issue the writ of attachment. It is, however, stated in the complaint that the plaintiff made application for a warrant of attachment, and that a warrant of attachment was issued. It must be presumed, therefore, in support of the judgment, in the absence of any showing to the contrary, that the proper affidavit was filed with the clerk, as the clerk could not legally issue the warrant until an affidavit was filed, and the presumption is that every public officer has done his duty. But, if such was not the presumption, the failure to allege that

a proper affidavit was filed would not necessarily render the complaint insufficient. As the action is upon the undertaking, the parties are estopped in this collateral action from questioning the regularity of the attachment. As the action is based upon the attachment, the proceedings in the attachment need not be set out: *Dunn v. Crocker*, 22 Ind. 324; *Trentman v. Wiley*, 85 Ind. 33; *Zachman v. Haak*, 85 Wis. 656, 56 N. W. 158.

The judgment of the circuit court and the order denying a new trial are affirmed.

Undertakings—Assignment.—It has been held that the assignment of a judgment after an appeal carries with it the security afforded by the appeal bond; and that the assignment of a judgment against a defendant in replevin operates as an assignment of the bond given by him for a return of the property; but that the assignment of a judgment in attachment does not carry the legal title to the attachment bond: See the monographic note to *Chilstrom v. Eppinger*, 78 Am. St. Rep. 50.

COMMERCIAL STATE BANK v. INTERSTATE ELEVATOR COMPANY.

[14 S. Dak. 276, 85 N. W. 219.]

A CHATTEL MORTGAGE OF GROWING GRAIN DESCRIBING it as a certain number of acres of wheat in the possession of the mortgagor in a certain county of the state, without naming the township or section, is insufficient to impart constructive notice. And this although the residence of the mortgagor is described with particularity. (pp. 762, 763.)

IN A CHATTEL MORTGAGE OF GROWING GRAIN, A PARTICULAR DESCRIPTION of the land upon which it is to be grown is necessary. The rule that a mortgage of personalty is sufficient if it is such that a person aided only and directed by such inquiry as the instrument itself suggests is able to identify the property, has little application to grain. (p. 762.)

CHATTEL MORTGAGE—RECEIPT OF DELIVERY OF COPY.—Under a statute requiring a delivery of a copy of a chattel mortgage to the mortgagor and a receipt of such delivery by him, the fact that the receipt is inserted in the body of the mortgage and signed before the execution of the mortgage, does not render the mortgage invalid. (pp. 763, 764.)

E. H. Wilson and C. D. Goldsmith, for the appellant.

Pyle & Taylor, for the respondent.

278 CORSON, J. This is an action by the plaintiff to recover of the defendant the value of five hundred bushels of wheat alleged to have been converted by the defendant. Judgment for the defendant and the plaintiff appeals. The plaintiff in its complaint alleged that it was entitled to the wheat by virtue of a chattel mortgage executed by one Hans Olson to the plaintiff, bearing date the ninth day of June, 1898, given to secure the payment of a certain promissory note executed by said Olson for the sum of seven hundred and twenty dollars and seventy-five cents, bearing date the same day, and payable on the first day of October, 1898, with interest at the rate of eight per cent per annum, and a copy of said mortgage is annexed to **279** the complaint and made a part thereof. The defendant in its answer admits that said Olson executed and delivered the instrument in writing set out in plaintiff's complaint, and that said instrument was left with the register of deeds for Miner county, and entered upon the records of Miner county as though it had been a chattel mortgage, but denied that said Olson executed any chattel mortgage at any time, and denied that any chattel mortgage executed by said Olson was at any time filed for record in the office of the register of deeds for Miner county. Defendant further alleged that it purchased of said Olson, and in good faith, and without any knowledge of the claim thereon of the plaintiff, five hundred and thirty-one bushels of wheat, and paid therefor the sum of two hundred and fifty-six dollars and seventy-eight cents, and that the defendant purchased said wheat without any knowledge whatever as to where said wheat was raised. The answer of the defendant was evidently drawn upon the theory that the description of the mortgaged property in the mortgage was insufficient to impart constructive notice to third persons, and that it was not, therefore, in law a chattel mortgage, and such seems to have been the view taken by the court below. The court in its findings, among other things, found that the wheat sold and delivered by Olson to the defendant, and by it converted to its own use, was raised during the year 1898 upon the west one-half of section 14, and the southeast quarter of section 15, township 105 north, range 55 west, in the county of Miner, being the same land mentioned in plaintiff's complaint, and that the defendant had no knowledge of these facts further than such constructive notice as the filing of the instrument executed by Olson to the plaintiff would impart. The

court further found that prior to the commencement of this action the plaintiff duly demanded that defendant deliver to it the said wheat so converted or the value thereof, and that the defendant has at all times refused to comply with such demand, and the court concludes as matter of law ²⁸⁰ that the description was insufficient to impart any notice to the defendant. The first question, therefore, presented for the decision of this court is, Was the description of the property as given in said mortgage sufficient to impart constructive notice to the defendant?

The mortgage, so far as necessary to be given in this opinion, reads as follows: "Know all men by these presents that Hans Olson, party of the first part, being justly indebted to the Commercial State Bank of Salem, McCook county, state of South Dakota, party of the second part, in the sum of seven hundred twenty and seventy-five hundredths dollars, which is hereby confessed and acknowledged, has, for the purpose of securing the payment of said debt, granted unto the said party of the second part, his successors or assigns, all that certain personal property described as follows, to wit: All the crops of every name, nature, and description, consisting of three hundred and forty acres of wheat, fifteen acres flax, ten acres oats; all the property now being in the possession of said first party in the county of ——— and county of Miner, and state of South Dakota, and is free from all encumbrance whatever, except two hundred dollars given to Wm. Blankartz."

This court has laid down the rule that "a mortgage of personal property is sufficient, as to description, if it be such that a prudent, disinterested person, aided only and directed by such inquiry as the instrument itself suggests, is able to identify the property": *Advance Thresher Co. v. Schmidt*, 9 S. Dak. 489, 70 N. W. 646; *First Bank v. Koechel*, 8 S. Dak. 391, 66 N. W. 933; *Coughran v. Sunback*, 9 S. Dak. 483, 70 N. W. 644. The rule above stated was adopted and applied in cases involving ordinary personal property, which can be easily identified, but has little application to grain, which can only be identified by the description of the particular real property upon which the grain is to be raised. In a chattel mortgage, therefore, of growing grain, it is necessary that there should be a particular description of the land ²⁸¹ upon which the grain is to be grown. Tested by this rule, we are of the opinion that the description of the property in the mortgage in the case at bar

is clearly insufficient to impart constructive notice to third persons. It will be observed that the only description in the mortgage is, "all crops of every name, nature, and description, consisting of three hundred and forty acres of wheat," etc., and being in the possession of said first party, Olson, in the county of Miner, in this state, and that neither the township nor section in which the land is situated is mentioned. The only description of the real property, therefore, upon which the grain was to be grown was that of being in the possession of said Olson. While this might be a sufficient description of ordinary personal property, it certainly cannot be sufficient in a chattel mortgage of growing grain, which is not, strictly speaking, in the possession of a party until harvested; and it would be imposing too great a burden upon third parties to require them to ascertain, before purchasing grain offered in the open market, what real property the mortgagor was in possession of, and that such grain was grown upon land in the actual possession of such mortgagor. While third persons may be required to ascertain, at their peril, that grain offered for sale has not been grown upon certain premises fully described in the mortgage, they certainly cannot be required to do so when no such description is given.

It is contended on the part of the appellant that in stating the residence of Hans Olson, the mortgagor, he is described as being of the west half of section 14, and the southeast quarter of section 15, township 105 north, range 55 west, in the county of Miner, and that, therefore, that qualifies the description of the property given in the mortgage; but we cannot so hold. Such a description is ordinarily given to identify the party, and it does not necessarily follow that, because the mortgagor was of or resided upon land described, such ²⁸² was the land upon which the grain mortgaged was to be grown, and we think that third parties were not required to assume that the grain offered for sale by Olson was the grain grown upon the land described in the mortgage as the land upon which Olson lived. It would be a dangerous rule to establish that a description of property such as that given in this mortgage, upon which mortgaged grain is to be grown, would be sufficient to impart constructive notice to third parties buying such grain of the mortgagor.

It has been doubted whether the rule allowing a chattel mortgage upon growing grain or crops to be raised in the fu-

ture under any circumstances was a wise one; but while such a mortgage may be regarded as too firmly established in this state to be now questioned, it certainly is our duty to hold parties to a strict rule, and require a full description of the realty upon which crops are to be grown. We are of the opinion, therefore, that the circuit court was clearly right in holding that the chattel mortgage in this case was void for uncertainty of description, and that its filing did not give constructive notice to third parties dealing with the property.

A second point was made by the respondent that it appears from the chattel mortgage in this case that there were inserted in the instrument words purporting to be a receipt admitting that a true copy of the mortgage was delivered to, and received by, the mortgagor before the mortgage was in fact executed, and that, therefore, the mortgage in controversy is void under the provisions of chapter 95 of the Laws of 1897, which, in effect, provides that the mortgagee of every chattel mortgage shall provide and deliver to the mortgagor a full, true, complete, and perfect copy of the same, and which further provides that unless it appear upon the mortgage instrument, over the signature of the mortgagor, that a true copy has been delivered to, and received by, the mortgagor, the said mortgage shall ~~283~~ be void. The specific point made by the respondent is that the receipt in the mortgage itself, signed by the mortgagor, is not a compliance with the statute; in other words, that the mortgage was not complete when the receipt was so signed, and that to make it a full and complete copy it should have been first executed, and a perfected mortgage, before a copy thereof could be delivered to the mortgagor, and that such receipt should have been upon the mortgage, and signed after the mortgage had been fully executed and perfected. We cannot agree with the respondent that the mortgage is invalidated for the reason stated. The evident object and purpose of the act of 1897 was to require to be placed in the hands of the mortgagor a full, true, complete, and perfect copy of the mortgage, in order that the mortgagor might be fully advised in regard to the instrument he has executed, and to enable him to detect any changes or alterations that might be made in the original instrument. It cannot be regarded, therefore, as material to him whether his receipt of the copy is contained in the mortgage at the time it is executed by him, or that such receipt is placed upon the mortgage after the same has been executed.

In either case, the receipt may be said to be upon the mortgage over his signature. We are of the opinion, therefore, that the construction contended for by the respondent is too narrow and restricted, and that the mortgage will be valid whether the receipt is contained in it at the time the same is signed by the mortgagor or is indorsed upon the mortgage after the same has been fully executed. While the indorsement of the receipt of the mortgagor upon the instrument after the same has been fully executed would be more formal and technically correct, the failure to observe this formal matter, and inserting the receipt at the end of the mortgage before the signature of the mortgagor, cannot, without a clear violation of the evident intention of the law-making power, be held to invalidate the instrument.

The judgment of the circuit court is affirmed.

Fuller, P. J., dissenting.

A Description in a Chattel Mortgage is sufficient if it will enable third persons, aided by the inquiries which the instrument indicates and directs, to identify the property: *Davis v. Pitcher*, 97 Iowa, 13, 59 Am. St. Rep. 392, 65 N. W. 1005; *Andregg v. Brunskill*, 87 Iowa, 351, 43 Am. St. Rep. 388, 54 N. W. 135; *Buck v. Davenport Sav. Bank*, 29 Neb. 407, 26 Am. St. Rep. 392, 45 N. W. 776; *Parker v. Chase*, 62 Vt. 206, 22 Am. St. Rep. 99, 20 Atl. 198. It is not a sufficient location of the property to say that it is in a county named: *Warner v. Wilson*, 73 Iowa, 719, 5 Am. St. Rep. 710, 36 N. W. 719. See the monographic note to *Barrett v. Fisch*, 14 Am. St. Rep. 239-247, on this subject. As to the sufficiency of descriptions of growing crops, see *Wattles v. Cobb*, 60 Neb. 403, 83 Am. St. Rep. 537, 83 N. W. 195; *Reinstein v. Roberts*, 84 Or. 87, 75 Am. St. Rep. 564, 55 Pac. 90; note to *Barrett v. Fisch*, 14 Am. St. Rep. 246, 247.

WAMPOL v. KOUNTZ.

[14 S. Dak. 334, 85 N. W. 595.]

EQUITABLE ESTOPPEL—ELEMENTS OF.—Neither affirmative acts or words, nor silence maintained with a fraudulent intent to deceive, is an indispensable element of equitable estoppel. (p. 767.)

EQUITABLE ESTOPPEL.—THE TERM "CONDUCT," as used in relation to equitable estoppel, embraces not only ideas conveyed by words written or spoken and things actually done, but includes silence and omission to act. (p. 768.)

ESTOPPEL TO SHOW FORGERY OF DEED.—One who suffers another to purchase land and expend money thereon in the

belief that his grantor's title is perfect, when in fact the deed to such grantor was forged, will not be allowed to assert title after concealing his claim and the forgery for over thirteen years. (pp. 766, 768.)

W. T. Williams, for the appellants.

Elliott & Stillwell, for the respondent.

³³⁶ FULLER, P. J. From a decree in equity quieting in plaintiff the title to a farm of one hundred and sixty acres the defendants appeal; and, to sustain the action of the trial court, respondent insists that the following uncontroverted facts forever estop appellants from claiming any right, title, or interest in and to the premises: Upon a sufficient showing of prior settlement, improvements, and cultivation of the tract, appellant Hattie E. Kountz—then Hattie E. Grant—made final proof thereof before the United States land office on the twenty-fifth day of October, 1872, and eight months thereafter received a patent, which was duly recorded in the office of the register of deeds. On the day final proof was made, appellants intermarried, and at no time since have either of them lived upon, cultivated, leased, or been in actual possession of the premises; and respondent and his grantor have always paid the annual taxes levied thereon. On the thirty-first day of October, 1872, D. P. Bradford, the father of Hattie E. Kountz, forged a quitclaim deed of the premises, fair upon its face, which purported to convey the title of his daughter Hattie to himself, and this deed was duly recorded on the thirtieth day of June, 1873. Relying upon such deed and the record thereof, D. W. Marsh, respondent's grantor, on the third day of September, 1873, purchased the premises, in the utmost good faith, for the consideration of seven hundred and fifty dollars, taking a quitclaim deed from Daniel P. Bradford and Harriet, his wife, which deed was duly recorded on the twenty-ninth day of August, 1874; and for sixteen years continuously thereafter Marsh paid all the taxes assessed ³³⁷ against the property, and redeemed the same from a tax sale at which appellant John T. Kountz became the purchaser. In the year 1889, without actual knowledge of an adverse claim, and for the consideration of seventeen hundred dollars, respondent purchased and obtained a deed to the premises from D. W. Marsh, a resident of a foreign country, and ever since that time has occupied, improved, and cultivated the same, with the actual knowledge of

appellants, who have always resided in the immediate neighborhood, and knew all that was being done upon the land from the time final proof was made in 1872 until the commencement of this suit in the year 1898. Though from the county records appellants both learned in the fall of 1885 that D. P. Bradford had forged the deed from his daughter to himself, and had sold and conveyed the premises to D. W. Marsh in 1873, they kept the matter a family secret for more than thirteen years after the acquisition of such knowledge, and until called upon to disclose the fact at the trial of this action. The avowed purpose of such willful delay in asserting their claim was to shield the father from the embarrassing consequences of his crime. They also knew that this previously unoccupied prairie land was leased for the years 1886 and 1887 by Mr. Torrence from D. W. Marsh, who, relying upon the public records and his deed from Bradford, had at the time innocently claimed to be the absolute owner of the premises for many years. Moreover, appellant John T. Kountz, who claims, by reason of an antenuptial contract made with Hattie E. Grant, to be the equitable owner of the premises, procured to himself a quitclaim deed from Bradford in 1892, and caused the same to be duly recorded, according to the advice of counsel; and his wife admits that, in consideration of certain money advanced pursuant to such contract, she promised and agreed to transfer the legal title to her husband. From the time of making final proof to the commencement of this action, appellants ³³⁸ in no manner asserted any proprietary rights or privileges, and never concerned themselves about the taxes legally assessed, which the respondent and his grantor have paid for a period of twenty-six years; and, as previously noticed, they permitted Marsh to redeem from the tax sale at which the husband purchased the land, sat quietly by, with full knowledge of the forged deed, while the tenant of Marsh occupied and improved the premises for a term of years, and at the time of the sale to respondent, and during the nine years that he was occupying, bettering, and paying for the property, they did nothing to indicate that they had an interest or ever intended to assert an adverse claim, but, on the contrary, allowed him to remain in ignorance of that which they had known since 1885. Knowledge that some person held adversely to appellants prior to 1885 is imputable from the fact that they never paid.

any taxes, and never asserted or attempted to assert the slightest interest in the property; and the procurement of a deed from Bradford to appellant John T. Kountz, who had long previously allowed Marsh to redeem from a tax sale, is sufficient to justify the inference that Bradford's deed from his daughter was all it purported to be. Under the circumstances, appellants were bound to know that some innocent purchaser was likely to be injured by their silence; and in equity, if not as a matter of law, they are guilty of laches. Neither affirmative acts or words, nor silence maintained with the fraudulent intention to deceive, are indispensable elements of an equitable estoppel; and the authorities are substantially agreed upon the proposition that a party cannot with impunity seal his lips and remain in idleness for years, irresponsible to the incessant demands of justice and good conscience: *Manufacturers' Bank v. Hazard*, 30 N. Y. 226; *Landsdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350. This favored doctrine of the courts justifies the use of the word "conduct" in its broader meaning, to prevent ²³⁹ the assertion and enforcement of claims as against a person who, relying in good faith upon the silence or inactivity of another, has thereby and to his detriment been led to change his position with reference to the title of property either real or personal. Thus the term "conduct," when applied to a person in its relation to the modern doctrine of equitable estoppel, embraces not only ideas conveyed by words written or spoken and things actually done, but it includes the silence of such person and his omission to act as well: *Pomeroy's Equity Jurisprudence*, 802-804. Appellants had ample time and opportunity to publish the truth, as duty demanded, and prevent the injury caused by their silence, maintained in order to protect their father while criminally holding himself out to the world as the former owner of the land. By the application of this doctrine that silence estops those whose duty it is to speak, one who passively, willfully, and knowingly suffers another to purchase and expend money on land under an honest though erroneous belief, based upon the county records, that his grantor's title is perfect, should not so long afterward be permitted to exercise against such purchaser any previously existing but undisclosed right of ownership: *Sweatman v. City of Deadwood*, 9 S. Dak. 380, 69 N. W. 582; *Hagan v. Ellis*, 39 Fla. 463, 63 Am. St. Rep. 167, 22 South. 727; *Alexander v. Woodford* etc.

Fishing Co., 90 Ky. 215, 14 S. W. 80; Hanner v. Moulton, 138 U. S. 486, 11 Sup. Ct. Rep. 408; Merchant v. Woods, 27 Minn. 396, 7 N. W. 826. The record discloses facts sufficient to justify the conclusion that appellants, for the purpose of protecting their father, elected to abandon their claim; and from such courts of equity must withhold relief, when productive of hardship and injustice to others.

Neither the decisions relied upon by counsel for appellant, nor the points urged in his argument, justify interference with the action of the court below; and for the reasons above stated the judgment appealed from is affirmed.

Estoppel in Pais Requires, as to the person against whom it is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such failure: *Prieve v. Wisconsin etc. Imp. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780. To constitute an estoppel in pais, there must be a false representation or concealment of known material facts, made to a party ignorant of their truth or falsity, and made with the intent that the party should act upon them, and he must have so acted: *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 263, 10 S. W. 891. Actual fraudulent intent is not essential: *Stevens v. Ludlum*, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771. If the owner of land deliberately stands by for years, and without objection sees persons buying the land and making improvements thereon under the supposition that they have a good title, he becomes estopped to set up his title against them: *Marines v. Goblet*, 31 S. C. 153, 17 Am. St. Rep. 22, 9 S. E. 803; *Lindsay v. Cooper*, 94 Ala. 170, 83 Am. St. Rep. 105, 11 South. 325. See, further, as to estoppel concerning title to land, *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575, 83 N. W. 230; *Prieve v. Wisconsin etc. Imp. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780; *Smith v. Sprague*, 119 Mich. 148, 75 Am. St. Rep. 384, 77 N. W. 689.

PLANO MANUFACTURING COMPANY v. AULD.

[14 S. Dak. 512, 86 N. W. 21.]

BANKING—MONEY COLLECTED BY A BANK FOR A GENERAL CUSTOMER, with the understanding that it shall be passed to his account, belongs to the bank, and the relation of debtor and creditor is created. (p. 772.)

BANKING.—MONEY COLLECTED BY A BANK FOR A STRANGER belongs to him and never becomes assets of the bank. It may be reclaimed by him to the exclusion of general creditors, upon the insolvency of the bank, if a sufficient amount remains in its vault. (p. 773.)

BANKING.—IF THE MONEY COLLECTED FOR SEVERAL STRANGERS by a bank and mingled with other funds exceeds the
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amount in its possession on its becoming insolvent, they are preferred creditors, each being entitled to a pro rata distribution. (pp. 771, 774.)

BANKING.—IF ONE FOR WHOM A BANK HAS COLLECTED a note brings suit, upon the insolvency of the bank, to impress a trust upon the money in its possession, and obtains a partial satisfaction, he should not be allowed, in that proceeding, to participate as a general creditor to the extent of the unpaid balance. If he deems himself entitled to a portion of the remaining assets, there is nothing to prevent an application therefor. (pp. 771, 774.)

Kirby & Winsor, for the plaintiff.

S. H. Bakewell, for the defendant.

514 FULLER, P. J. With the judgment in this action to require the receiver of an insolvent banking corporation to pay the full amount of a promissory note collected for plaintiff by the bank shortly before its failure neither party is satisfied, and both have appealed. The facts as found by the court are undisputed, and substantially these: The note, being for \$879, was paid to the bank by the maker thereof on the fifteenth day of December, 1899, and the amount was not remitted to the owner, but commingled with the funds of the bank. On the twenty-second day of January, 1900, when the receiver took possession of the assets of the bank, which had in the meantime become insolvent, he found only \$2,185.37 in cash. Concerning the condition of the bank and its relation to some other creditors the court finds as follows: "That during the month of September, 1899, the German-American Savings Bank, of Burlington, Iowa, sent to the said Bank of Plankinton, for collection and return, three bonds issued by Aurora county in the sum of \$500 each. That thereafter the treasurer of Aurora county took up said bonds by giving said bank a check for the amount. That the said sum of \$1,547 has never been paid to the said German-American Savings Bank, nor any part thereof, but said money was mixed and mingled with all other money in the Bank of Plankinton at the time; **515** and the said German-American Savings Bank has demanded the said amount of this receiver, claiming and insisting that the same is a trust fund in the hands of this receiver. That during the month of December, 1899, the Pittsburg Plate-Glass Company of Davenport, Iowa, sent to the Bank of Plankinton, for collection and return an account of \$396.56 against J. D. Bartow. That thereafter, on the eighteenth day of December, 1899, the said J.

D. Bartow paid to the said Bank of Plankinton the sum of \$396.56 in settlement of said account. That said sum has not been remitted to the said Pittsburg Plate-Glass Company, but was mixed and mingled with all other moneys in the Bank of Plankinton at the time. That the said Pittsburg Plate-Glass Company has demanded the said amount of this receiver, claiming and insisting that the same is a trust fund in the hands of the receiver. That on or about the third day of November, 1899, Curtis & Romaine, of New York, sent to the Bank of Plankinton, for collection and return, a courthouse and jail bond issued by Aurora county, amounting to \$517.50. That thereafter the treasurer of Aurora county took up said bond and paid the amount due thereon in full. That the said sum has not been remitted to the said Curtis & Romaine, but was mixed and mingled with the other money of the said bank at that time; and the said Curtis & Romaine have demanded the said amount of this receiver, claiming and insisting that the same is a trust fund in the hands of the receiver. That on or about the sixteenth day of December the Bank of Plankinton received from one George M. Hurd, through the Fidelity Trust and Guarantee Company, a warranty deed for the purpose of collection and remittance of the consideration mentioned in said deed, to wit, the sum of \$800, from one W. G. Groves. That thereafter the said W. G. Groves paid to the Bank of Plankinton the said sum of \$800 for said deed, and the said sum of \$800 has not been remitted to the said ⁵¹⁶ George M. Hurd, or anyone for him, but was mixed and mingled with other moneys of the bank at the time. That the said George M. Hurd has demanded said amount of this receiver, and has brought suit therefor, claiming and insisting the same is a trust fund in the hands of this receiver. That there are numerous other claimants having claims of like character to the above mentioned, aggregating the sum of \$1,000, and nearly all of them have demanded of this receiver their respective amounts, claiming and insisting that they are trust funds in the hands of this receiver. That the entire property—notes, money, and all things of value—belonging to said Bank of Plankinton, or under its control, at the time of its failure on January 9, 1900, did not exceed the sum of \$25,000, and the liabilities of said Bank of Plankinton at that time were about the sum of \$45,000; and that said Bank of Plankinton was substan-

tially in that financial condition for about one year prior to its failure, and was during the entire year prior to its failure insolvent. That all of the moneys, deposits, funds, and cash of every kind and character received by the said Bank of Plankinton for a year prior to its failure were mixed and mingled together in one mass, and at all times were so kept and mingled together in the cash receptacle in said bank in the vault thereof until the same was paid out or disposed of in the course of business of said bank, and on the 9th of January, 1900, the time of the failure of said bank, there was but \$2,185.37 left in the said Bank of Plankinton." From the foregoing facts the court concluded as a matter of law that plaintiff and the other claimants mentioned in its findings are preferred creditors, each being, in the due course of administration, entitled to a pro rata distribution of the \$2,185.37. The contention of counsel for the Plano Manufacturing Company is that the court should have decreed the amount of its note to be a trust fund, and ⁵¹⁷ ordered the payment thereof immediately from the aggregate assets of the bank, while counsel for the receiver maintains that the court erred in not finding plaintiff to be, as a matter of law, but a simple contract creditor, without any preference whatever.

Upon the theory that the receiver is but a servant of the court, and not a party aggrieved by the decision of which he complains, a motion is made in this court to dismiss his appeal. Assuming, without deciding, that as the representative of all the creditors a receiver has the right to appeal from the order or decree affecting funds in his charge, we will pass to a consideration of the questions presented by counsel for the Plano Manufacturing Company. If, as claimed by them, the receiver is a mere instrument of the court, he is certainly no more the special representative of the party bringing the action than that of any other person interested in or having a claim upon funds in custodia legis, whose rights, so far as ascertainable, it is the duty of the court to protect. Being thus charged through the instrumentality of the receiver, with the duty of performing, so far as capable, all the obligations of the insolvent bank, the condition of its assets and its relation to all persons interested, as well as the legal effect of its contracts, express or implied, are subjects demanding most careful consideration. According to an invariable rule,

money deposited by a general customer, or collected for him upon a note with the understanding that the same shall be passed to his account, kept subject to check, the entire amount belongs to the bank, and the relation of debtor and creditor thus voluntarily created precludes him, in case the bank becomes insolvent, from participating in the distribution of funds acquired by the bank in violation of the trust which adheres to the relation of principal and agent. Mr. Thompson's view of the point is thus expressed: "A distinction must be admitted, resting on clear ⁵¹⁸ grounds, where the person who sends the paper to the bank for collection has no general deposit with the bank. Here, as soon as the money is collected by the bank and comes into its treasury, it is not passed as an addition to the general balance of the depositor of the paper, such as, under ordinary circumstances, may reasonably be supposed to impress it with the character of a general deposit; but the collecting bank clearly stands in the position of any other collecting agent or bailee. The money which it has collected does not belong to it. The performance of the service required of it does not create the mere relation of debtor and creditor between it and the person to whom the service has been rendered, such as arises in the case of an ordinary bank deposit, but the money belongs to such person, and must be restored to him by the receiver in full": 5 Thompson on Corporations, 7097. Had the bank transacted its business agreeably to the general custom of such institutions, the money collected upon the note could not, in any sense, become even a special deposit, and the relation of debtor and creditor between the bank and the corporation transmitting the note for collection and return was never contemplated. The character of the transaction and the nature of the service required placed the collecting bank and the owner of the note in the attitude of principal and agent, and the money collected never belonged to the bank, nor did its retention create, in a legal sense, the relation of debtor and creditor. According to the true doctrine, the relation of bailor and bailee continued after the mingling of the funds, and, as the money never became assets of the bank, general creditors are entitled to no share in its distribution. One dollar being the same as another in every material respect, an earmark is not essential to its identification, and if a sufficient amount in kind remains in the vault of an insolvent bank, it

may be reclaimed by its owner, to the exclusion of general creditors. A presumption ⁵¹⁹ governing modern courts in tracing a trust fund wrongfully mingled by a trustee with his own funds, out of which aggregate he has made disbursements in the due course of business, is that he used his own money in preference to embezzling that of others. So says the supreme court of Wisconsin in its latest utterance upon the subject (*Taylor v. National Bank*, 6 S. Dak. 511, 62 N. W. 99): "When a trustee mingles trust money with his own in a bag, or box, or bank account, the right of the beneficiary attaches to have all that belongs to him out of the bag, box, or account, and whatever the trustee may take out will be deemed or presumed to have been taken from his own, instead of the trust, funds." Applying that doctrine to this case, the inference must prevail that the remaining money, which passed into the hands of the receiver, belongs to the persons for whom collections were made, and should be restored to them according to the principles of equity and good conscience: *Kimmel v. Dickson*, 5 S. Dak. 221, 49 Am. St. Rep. 869, 58 N. W. 561. In the very recent case of *Richardson v. New Orleans etc. Redemption Co.*, 42 C. C. A. 619, 102 Fed. 780, the court say: "There should be no question about this doctrine on principle. If one's money is invested in land, the title being taken in another's name, equity creates a resulting trust in the land as against the wrongdoer. If an agent, bailee, or trustee invests another's money in personal property, a trust results. If one's money is lent, and a note or bond taken, the owner of the money can have a lien or trust declared on the note or bond to secure his money so used. Numerous cases show that money can be traced into other assets, notes, bonds, and stocks. There is no good reason for not applying the same doctrine to money, the measure and representative of all property. If one's money is used with other money in buying a bond, equity can fasten a lien on the bond, and sell it to reimburse the one whose money has been so used. So we think, ⁵²⁰ if one's money is wrongfully mingled with a mass of money, that equity can direct the possessor and wrongdoer, or his successor, to take out of the mass a sum sufficient to make restitution": *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54; *People v. City Bank of Rochester*, 96 N. Y. 32; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W.

802; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; Harrison v. Smith, 83 Mo. 210, 53 Am. Rep. 571; Quin v. Earle, 95 Fed. 723; Board of Fire etc. Commrs. v. Wilkinson, 119 Mich. 655, 78 N. W. 893. The general assets of the bank not being available as a trust fund, and the money received on collections being insufficient to satisfy all legal demands thereon, the trial court was fully justified in its plan of distribution among those whose claims of like character were clearly established without objection. Such ratable distribution is in the interest of justice, and tends to prevent a multiplicity of actions. Should the Plano Manufacturing Company deem itself entitled to a portion of the remaining assets, there is nothing to prevent an application therefor, and there is no merit in the contention that the court should have allowed it in this proceeding to participate as a general creditor to the extent of its unpaid balance.

We think the trial court was right in every particular, and the judgment appealed from is affirmed.

WHEN A BANK DOES NOT TAKE TITLE TO MONEY DEPOSITED WITH OR COLLECTED BY IT, AND THE RIGHT TO RECOVER SUCH MONEY UPON THE INSOLVENCY OF THE BANK.

I. Title to Money Deposited with, or Collected by, a Bank.

- a. General Deposits.
- b. Special Deposits.
 - 1. In General.
 - 2. What Constitutes a Special Deposit.
- c. Deposits of Negotiable Paper.
 - 1. When Received as Cash.
 - 2. When Received for Collection.
 - 3. What Constitutes a Deposit for Collection.
- d. Proceeds of Paper Deposited for Collection.
 - 1. In General.
 - 2. Effect of Custom of Banks to Credit Depositor with Proceeds.
 - 3. Where Bank Does not Receive Cash in Payment.
 - 4. Where Bank Receives Proceeds of Collection After Becoming Insolvent.
 - 5. Title as Between Remitting and Correspondent Banks to Paper Sent Latter for Collection.
 - 6. Title as Between Remitting and Correspondent Banks to Proceeds of Paper Sent to the Latter for Collection.

In re Madison Bank, Fed. Cas. No. 890, 5 Biss. 515; *Foley v. Hill*, 2 H. L. Cas. 28; *Sims v. Bond*, 5 Barn. & Adol. 389.

b. Special Deposits.

1. **In General.**—There is, however, a well-established distinction between general and special deposits, and in no connection is this difference more decisive than in connection with the question whether title to the money or paper deposited passes to the bank. Where money or any article is deposited in a bank and the identical coin or article is to be returned to the depositor and not an equivalent, the deposit is special. In the case of a general deposit, title thereto invariably passes to the bank and as we have seen becomes its property, to be dealt with as it sees fit. In the case of a special deposit, however, no title passes from the depositor to the bank. The transaction is not, as in the case of a general deposit, a loan, but is a bailment, and the banker and customer bear to each other not the relation of debtor and creditor, but that of bailor and bailee. The bank may not use such deposit as it sees fit, and any use of it, unwarranted by the terms of deposit is a conversion. Its duty is that of any bailee to keep safely and to use due diligence and care. If, therefore, the deposit be lost without the negligence of the bank, it is not responsible therefor, and the loss falls upon the depositor from whom the title has never passed. That the bank does not take title to special deposits, see *Merchants' Nat. Bank v. Guilmartin*, 44 Am. St. Rep. 182, 93 Ga. 503, 21 S. E. 55; *Gray v. Merriam*, 148 Ill. 179, 39 Am. St. Rep. 172, 35 N. E. 810; *Mutual etc. Assn. v. Jacobs*, 141 Ill. 261, 33 Am. St. 302, 31 N. E. 414; *Marine Bank v. Chandler*, 27 Ill. 525, 81 Am. Dec. 249; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911; *In re Louisiana Sav. Bank etc. Co.*, 40 La. Ann. 514, 4 South. 301; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Cutler v. American Nat. Bank*, 113 N. Y. 593, 21 N. E. 710; *Gibson v. City of Erie*, 196 Pa. St. 7, 46 Atl. 103; *Beal v. City of Somerville*, 50 Fed. 647, 1 C. C. A. 598.

2. **What Constitutes a Special Deposit.**—The above principles are plain and undoubted. Their practical application, however, is by no means so free from difficulty. It is in many cases a very doubtful question whether a deposit is general or special. The distinction is theoretically plain. A general deposit is one which is to be repaid on demand in money. A special deposit is one in which the depositor is entitled to the return of the identical coin or other article deposited. The difficulty lies in the determination of what was intended by the parties to the deposit. Whether a deposit is general or special depends, of course, upon the intent of the parties. A deposit will, however, always be deemed to be general, unless made special by agreement: *Bank of Blackwell v. Dean*, 9 Okla. 626, 60 Pac. 226; *Brahm v. Adkins*, 77 Ill. 263; *Bank of Marysville v. Windischmuhlhauser Brewing Co.*, 50 Ohio St. 151, 40 Am. St. Rep.

660, 33 N. E. 1054; Ward v. Johnson, 95 Ill. 215; Boettcher v. Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582. And a deposit may be shown to be general, though marked "special" in the pass-book of the depositor: Carr v. State, 104 Ala. 43, 16 South. 155. See, also, McLain v. Wallace, 103 Ind. 562, 5 N. E. 911.

The type case of a special deposit is that in which money is delivered to a bank in a box or bag with an agreement, express or implied, that the identical package shall be returned: United States v. Peters, 87 Fed. 984. On the other hand, money not deposited in any package, credit for which is given generally upon a pass-book, or in a certificate showing nothing to indicate that the identical money must be returned, will be treated as a general deposit, the title to which is in the bank: Wallace v. State Bank, 7 Ark. 61; Matthew v. His Creditors, 10 La. Ann. 342; In re Franklin Bank, 1 Paige, 249, 19 Am. Dec. 413.

The mere fact that money is deposited by a receiver as officer of a court, or by order of a court, will not render the deposit special. The ordinary relation existing between banker and customer—that of debtor and creditor—exists between the depositary and the court, and although the former is, by reason of being appointed depositary, an officer of the court, he nevertheless takes title to the deposit: Otis v. Gross, 96 Ill. 612, 36 Am. Rep. 157; In re Western Marine etc. Ins. Co., 38 Ill. 289; Southern Development Co. v. Houston etc. R. Co., 27 Fed. 344.

A frequent class of cases, and one concerning which there is much confusion of authority, consists of those cases in which money is deposited with a bank, with respect to which the bank has but a single duty to perform. Where it is the intent of the parties that this duty is to be performed upon the identical money deposited, as where the bank is to pay it to a third party, the deposit is special, and the bank is a mere agent for the performance of that duty: Cutler v. American Exch. Nat. Bank, 113 N. Y. 593, 21 N. E. 710. The far more usual case, however, is that in which the parties did not contract with reference to the identical coin deposited, but with reference merely to the amount of that deposited. There may, of course, be a trust in such case to apply the amount of such deposit to the particular end agreed upon, but it is plain that the deposit cannot be special in the strict sense. This distinction is, however, frequently lost sight of, and the result is great confusion in the authorities, as to whether or not title passes to the bank in such a case. Montagu v. Pacific Bank, 81 Fed. 602, is a striking instance of this confusion. Money was there received by the defendant bank with instructions to transfer it by telegram from San Francisco to Seattle, but the money was not so transferred. There can be no doubt that this was as the court says "made for a specific purpose." It is, however, equally clear that it was not strictly speaking a "special deposit." The parties could not, in the nature of things,

intend to transfer the identical money by telegram. What was intended was that the Pacific Bank should transfer an amount equal to the amount deposited. This, however, means that title passed to the bank, and the transaction cannot with any accuracy be "a special deposit in the nature of a bailment." In *Farley v. Turner*, 26 L. J. Ch. 710, cited in *Montagu v. Pacific Bank*, 81 Fed. 602, Kindersley, V. C., recognizing the distinction, says: "I admit that the money is not a particular deposit with the bankers, but it is money placed in their hands to be applied in a particular way. What I now decide will not trench upon the authorities which decide that money paid into a bankers' is not a deposit which you may receive back in the identical notes and sovereigns, but it is a debt."

This confusion of the cases in which title to a deposit remains in the depositor and those in which the deposit does pass title, though a title burdened with a trust, is quite general. Many cases term such deposit a mere bailment: *Danforth, J.*, in *People v. City Bank of Rochester*, 96 N. Y. 82; *Kimmel v. Dickson*, 5 S. Dak. 221, 49 Am. St. Rep. 869, 58 N. W. 561; *Montagu v. Pacific Bank*, 81 Fed. 602; while others insist that it constitutes a trust fund and couple this statement with the wholly inconsistent one that "no title or interest in the fund ever passed to the bank": *Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 900. The true view undoubtedly is that title does pass to the bank, but that the fund is burdened with a trust to apply it to the purpose for which it was deposited. The contract is not that of bailor and bailee, but of trustee and cestui que trust: *Wetherell v. O'Brien*, 140 Ill. 146, 83 Am. St. Rep. 221, 29 N. E. 904, reversing 41 Ill. App. 142; *Ward v. Johnson*, 95 Ill. 215; *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646, 10 N. E. 360; *Star Cutter Co. v. Smith*, 37 Ill. App. 212; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *Stoller v. Coates*, 88 Mo. 514; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 115; *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407; *In re Commercial Bank*, 4 Ohio Dec. 108, 2 Ohio N. P. 170; *Massey v. Fisher*, 62 Fed. 958.

Deposits made with an agreement that they will not be mingled with the funds of an insolvent bank, but will be held subject to check, are not special, and title thereto passes to the bank: *In re Mutual etc. Bank*, 2 Hughes, 374, Fed. Cas. No. 9976. Nor does the drawing of checks (some of them certified) at the time of making a deposit render that deposit a special fund for the payment of such checks: *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407. Money deposited to take up a check is a special deposit, and the property therein remains in the depositor: *Star Cutter Co. v. Smith*, 37 Ill. App. 212.

A not infrequent case is that in which money is deposited with a bank to secure it or a third party from liability upon a bond or other instrument. In *State Building etc. Assn. v. Mechanics' etc.*

Bank (Tenn.), 88 S. W. 967, and in *Dearborn v. Washington Sav. Bank*, 13 Wash. 345, 42 Pac. 1107, such deposit was held to pass title to the bank and to amount to no more than a general deposit held for a specific purpose. In *Mutual etc. Assn. v. Jacobs*, 43 Ill. App. 840, affirmed in *Mutual etc. Assn. v. Jacobs*, 141 Ill. 261, 33 Am. St. Rep. 302, 31 N. E. 414, the plaintiff sued to recover the amount of a deposit made by it with one K., as indemnity on an appeal bond. The deposit was mingled and used with the general funds of the bank, with the knowledge of the plaintiff, and it was held that the deposit was a general one and that the title was in the bank. This case was, however, distinguished in *Anderson v. Pacific Bank*, 112 Cal. 598, 53 Am. St. Rep. 228, 44 Pac. 1063, and upon a very similar state of facts except that the plaintiff did not there know of the mingling of funds by the bank, the deposit was held to be a special one, and the title was accordingly held not to have passed. The court there said: "Defendant demanded a delivery to it of two thousand dollars, not for banking purposes, but to protect the bondsmen it might procure. There was [every] reason why the plaintiff should make a special deposit with the bank as bailee and none at all why he should make a commercial deposit of that sum."

c. Deposits of Negotiable Paper.

1. *When Received as Cash.*—We have already seen that a general deposit of money with a banker transfers the title to such money to the bank and creates the relation of debtor and creditor between the banker and the depositor. The same rule applies with equal force to checks or drafts deposited by a customer, and it is established beyond doubt that whenever paper is deposited and is regarded by both parties as amounting to so much cash, the title to such paper passes immediately, and the relation of debtor and creditor arises. The transaction is equivalent to a purchase of the check or draft by the banker, and he becomes responsible to the depositor for the amount thereof: *Doppelt v. National Bank of the Republic*, 74 Ill. App. 429; *Lanterman v. Travous*, 73 Ill. App. 670; *American Exch. Bank v. Greggs*, 37 Ill. App. 425; *Wasson v. Lamb*, 120 Ind. 514, 16 Am. St. Rep. 342, 22 N. E. 729; *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. 887; *Security Bank v. Northwestern Fuel Co.*, 58 Minn. 141, 59 N. W. 987; *In re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336; *Kavanaugh v. Farmers' Bank of Maitland*, 59 Mo. App. 540; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588; *Hoffman v. First Nat. Bank*, 46 N. J. L. 604; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Bank v. Loyd*, 90 N. Y. 530; *Stuyvesant Bank v. National Mechanics' Bldg. Assn.*, 7 Lans. 197; *Walton v. Riverside Bank*, 58 N. Y. Supp. 1008, 28 Misc. Rep. 449; *Moore v. Riverside Bank*, 55 N. Y. Supp. 615, 25 Misc. Rep. 720; *Balbach v. Frelinghuysen*, 15 Fed. 675; *National Bank v. Burkhardt*, 100 U. S. 686.

2. **When Received for Collection.**—To produce this result, however, it must appear that the check or draft was received as a deposit to be treated as cash, and that such was the intention of both parties. If the draft was deposited for collection merely, it is quite plain that the bank does not take title, but merely acts as agent for collection. The property in the check or draft remains in the depositor, and the relation arising from the transaction is not that of debtor and creditor, but of principal and agent: *Morris v. Eufaula Nat. Bank*, 122 Ala. 580, 82 Am. St. Rep. 95, 25 South. 499; *Fourth Nat. Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891; *Freeman v. Exchange Bank of Mason*, 87 Ga. 45, 13 S. E. 160; *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717; *Prescott v. Leonard*, 32 Kan. 142, 4 Pac. 172; *Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin, 181; *In re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336; *Bank v. Rall*, 60 Mo. App. 585; *Griffin v. Chase*, 36 Neb. 328, 54 N. W. 572; *National Butchers' etc. Bank v. Wilkinson*, 10 N. Y. St. Rep. 290; *Scott v. Ocean Bank*, 23 N. Y. 289, affirming 18 N. Y. Super. Ct. 192; *Oppenheim v. West Side Bank*, 50 N. Y. Supp. 148, 22 Misc. Rep. 722; *Walton v. Riverside Bank*, 60 N. Y. Supp. 519, 29 Misc. Rep. 304, affirming 58 N. Y. Supp. 1008; 28 Misc. Rep. 449; *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365; *National Bank of Commerce v. Johnson*, 6 N. Dak. 180, 69 N. W. 49; *Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921, 27 S. W. 669; *Beal v. City of Somerville*, 50 Fed. 647, affirming 49 Fed. 790; *Balbach v. Frelinghuysen*, 15 Fed. 675; *German-American Bank v. Third Nat. Bank*, Fed. Cas. No. 5359; *Levi v. National Bank of Missouri*, 5 Dill. 104, Fed. Cas. No. 8289.

3. **What Constitutes a Deposit for Collection.**—These principles are well established and control all questions as to the passage of title where paper is deposited with a banker. If the parties intended to treat such paper as cash, title passed immediately upon receipt of the deposit by the banker. If it was intended that the bank should not be responsible except as agent for collection, title remains in the principal throughout. The difficulty lies in the determination of what the parties intended, and this must necessarily depend upon the facts of each case. The question is, therefore, one of fact rather than of law: *Balbach v. Frelinghuysen*, 15 Fed. 675; *City of Somerville v. Beal*, 49 Fed. 790. In every case, however, certain facts are present, and as to these certain fairly definite principles with reference to their effect in indicating the nature of the contract and whether title was intended to pass may be formulated.

When checks or drafts are deposited in a bank, the presumption is that they were deposited for collection merely and not as cash. "It is," said the court in *Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin, 185, "hard to imagine any advantage which could exist, calculated to induce a bank to assume ownership and responsibility

for such paper." And in *Beal v. City of Somerville*, 50 Fed. 647, it was said: "Such a position would reverse all the principles applicable to the simple transaction of a deposit, or other bailment, and cannot be sustained except by evidence of a special agreement, or of such practice or custom as would be equivalent thereto": See, also, *Perth v. Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Scott v. Ocean Bank*, 23 N. Y. 289, affirming, 18 N. Y. Super. Ct. 192; *Goden v. Newfoundland Savings Bank*, [1899] App. Cas. 281; where, however, the check or draft is drawn in favor of the bank holding it, the presumption is authorized: *Gettysburgh Nat. Bank v. Kuhns*, 62 Pa. St. 88. As to the presumption obtaining where the check or draft is drawn upon the same bank with which it is deposited, there is a very decided conflict of authority. In *National Gold Bank v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697, the rule is laid down "that when a check on the same bank is presented by a depositor with his pass-book to the receiving teller, who merely receives the check and notes it in his pass-book, nothing more being said or done, this does not, of itself, raise a presumption that the check was received as cash or otherwise than for collection." *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160, was considered and the opinion opposite to this view there expressed was said to be obiter dictum. In *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138, the authorities are collected and discussed and the conclusion was reached that in such a case a presumption of payment arises, and the title to the check or draft passes from the depositor. And such would seem to be the rule according to the weight of authority: *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *National Bank v. Burkhardt*, 100 U. S. 686; *Bolton v. Rich*, 6 Term Rep. 139.

It is quite well settled that merely crediting the depositor with the amount of the check, whether this be done in his pass-book or upon the books of the bank, is by no means conclusive evidence that the paper was received as cash or otherwise than for collection. Such credit, made in anticipation of collection, will be deemed merely provisional, and the bank may cancel the credit or charge back the paper to the customer's account if it is not paid by the maker or drawer: *National Gold Bank v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697; *In re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 338; *South Park Foundry etc. Co. v. Chicago etc. Ry. Co.*, 75 Minn. 186, 77 N. W. 796; *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365; *Rapp v. National Security Bank*, 136 Pa. St. 426, 20 Atl. 508; *Beal v. City of Somerville*, 50 Fed. 647; *City of Philadelphia v. Eckels*, 98 Fed. 485; *Balbach v. Frelinghuysen*, 15 Fed. 675; *Goden v. Newfoundland Sav. Bank*, [1899] App. Cas. 281. Upon the other hand, if title to the paper was intended to pass by the parties, from whatever circumstances this may ap-

pear. the mere fact that it was agreed or understood that the banker would have the right to charge the amount of such paper back to the depositor in case it proved uncollectible, will not change the relation of debtor and creditor: *Brusegaard v. Ueland*, 72 Minn. 283, 75 N. W. 228; *Dyomock v. Midland Nat. Bank*, 67 Mo. App. 97; *Bank v. Roll*, 60 Mo. App. 585; *Ayres v. Farmers' etc. Bank*, 79 Mo. 421, 49 Am. Rep. 235.

In some cases, the fact that the depositor had the privilege of drawing against a check deposited by him even before it was collected has been held to be inconsistent with any transaction which does not vest title to such paper in the bank: See *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280. It is, however, by the great weight of authority, not conclusive. It is undoubtedly strong evidence that it was intended that the bank should become absolutely responsible for the check or draft, but the contrary may still be shown by evidence or implied from other facts. "The fact that owing to the short course such paper has to run, these institutions usually permit their customers to draw against the amount of checks deposited, does not, of itself, alter the relations between the parties. The credit is only conditional, and may be canceled and the check returned should the latter be dishonored. The depositor remains owner of the paper, and the bank merely the agent": *Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin, 181, citing *Scott v. Ocean Bank*, 23 N. Y. 289; *Giles v. Perkins*, 9 East, 12; *National Gold Bank v. McDonald*, 51 Cal. 64. Such a privilege is merely gratuitous, and does not grow into a binding legal usage: *Balbach v. Frelinghuysen*, 15 Fed. 675. See, also, *Brusegaard v. Ueland*, 72 Minn. 283, 75 N. W. 228; *In re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336; *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365; *Beal v. City of Somerville*, 50 Fed. 647.

Where it is stipulated, or notice is given, in the pass-book of the depositor that the bank in receiving checks does so as agent for collection only, such stipulation forms part of the contract and title will not pass: *In re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336; *South Park Foundry etc. Co. v. Chicago etc. Ry. Co.*, 75 Minn. 186, 77 N. W. 796.

In determining whether or not it was intended that the bank should take title to the paper, the language used by the depositor in indorsing the check to the bank is very material. Where the indorsement is unrestricted it may, of course, be shown, as between the parties, at least, that it was for collection only. "There can be no doubt that if a draft or other paper is indorsed to a bank for collection, the mere fact that the indorsement of the owner is unrestricted will not, as between him and the bank, make the latter the owner of the property": *In re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336. Where, however, the indorsement is restrictive, the case is even clearer, and the plain import of an

indorsement such as "for collection," "for collection and credit," "for account and credit," etc., is that it was not intended to pass title to the paper so indorsed. As was said in *Sweeny v. Easter*, 1 Wall. 166: "The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that contrary to the purpose of a general or blank indorsement this was not intended to transfer the ownership of the note or its proceeds"; See, also, *Central Ry. Co. v. First Nat. Bank*, 78 Ga. 383; *Armstrong v. National Bank*, 90 Ky. 431, 14 S. W. 411; *Tyson v. Western Nat. Bank*, 77 Md. 412, 26 Atl. 520; *Manufacturers' etc. Bank v. Continental Bank*, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193; *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass. 413, 21 Am. St. Rep. 461, 24 N. E. 779; *Merchants' Nat. Bank v. Hanson*, 38 Minn. 40, 58 Am. Rep. 5; *Hoffman v. Bank*, 46 N. J. L. 604; *National Butchers' etc. Bank v. Hubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515, 22 N. E. 1031; *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. Rep. 533. In *Beal v. City of Somerville*, 50 Fed. 647, the indorsement "for deposit" was held not to pass title to the bank—overruling as to this point the decision in 49 Fed. 790, although the judgment was affirmed upon another ground. A diametrically opposite conclusion was reached, however, in *Ditch v. Western Nat. Bank*, 79 Md. 192, 47 Am. St. Rep. 375, 29 Atl. 72, 138, citing *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. 160. Fowler, J., dissented, and in a strong opinion, reviewing the various cases, reached a conclusion in line with that of *Beal v. City of Somerville*, 50 Fed. 647, holding the "plain import of such an indorsement" to be "that the check was deposited for collection. . . . We think, therefore, that looking at the indorsement itself, without regard to the course of dealing between the parties, the language of the indorsement cannot be held to transfer title to the check in question, but, on the contrary, must be held restrictive, at least until the bank has performed its duty and has collected the proceeds of the check." The weight of authority, however, seems to be with the conclusions of the majority of the court: See cases cited above, and *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 182 Ill. 367, 74 Am. St. Rep. 180, 55 N. E. 360; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431, 14 S. W. 411; and "for deposit" indorsed upon a check is, in the absence of a different understanding, presumption of more than a mere agency or authority to collect; it is a request and direction to deposit the sum to the credit of the customers: *Armstrong v. National Bank of Boyertown*, 90 Ky. 431, 14 S. W. 411.

d. Proceeds of Paper Deposited for Collection.

1. In General.—When, however, it is finally determined that a deposit of a check or draft was for collection only and vested no title to such paper in the banker, the question still remains as to the title to the proceeds of such check or draft. Here again the question is simply one of the intention of the parties. If they intended, and it was agreed or understood that the proceeds should be remitted immediately upon reception, or if in any other way it can be shown that the parties intended that the proceeds of the check as well as the check itself should remain the property of the owner, such intention will control and the banker will not take title to the proceeds: *In re Johnson*, 103 Mich. 109, 61 N. W. 352; *Wallace v. Stone*, 107 Mich. 190, 65 N. W. 113; *German Ins. Co. v. Kimble*, 66 Mo. App. 371; *Griffin v. Chase*, 36 Neb. 328, 54 N. W. 572; *People v. Dansville Bank*, 39 Hun, 187; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802. See, however, *Philadelphia Nat. Bank v. Dowd*, 38 Fed. 172.

2. Effect of Custom of Banks to Credit Depositor with Proceeds.—In the absence of such general agreement, however, "the custom of bankers to credit customers with the proceeds of paper left for collection when the paper has been collected is universally recognized; and customers and bankers are presumed to contract and deal together in view of this usage. The law, therefore, authorizes the banker to credit the customer with the proceeds in lieu of making a specific delivery; and the necessary effect of an authorized credit is to create the relation of debtor and creditor between them from the time when the credit is given": *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408. From this it follows that the bank takes title to the proceeds of a check or draft deposited with it for collection, immediately upon crediting the depositor with the amount of such proceeds. In this connection the rights of a bank are different from and greater than those of other attorneys or agents, as is pointed out in *Tinkham v. Heyworth*, 31 Ill. 519. The bank occupies the position of an agent for collection until the proceeds are actually received and credited, whereupon it takes title thereto, and the relation of debtor and creditor takes the place of that of principal and agent: *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. 160; *Marine Bank v. Rushmore*, 28 Ill. 463; *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *First Nat. Bank v. Craig*, 3 Kan. App. 166, 42 Pac. 830; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366; *Pacific Bank v. Mitchell*, 50 Mass. 297; *Billingsley v. Pollock*, 69 Miss. 759, 30 Am. St. Rep. 585, 13 South. 828; *People v. City Bank*, 93 N. Y. 582; *People v. Merchants' etc. Bank*, 78 N. Y. 269, 34 Am. Rep. 532; *Gordon v. Rasines*, 5 Misc. Rep. 192, 25 N. Y. Supp. 767; *Commercial Bank v. Davis*, 115 N. C. 226, 20 S. E. 370; *Commercial Bank v. Davis*,

114 N. C. 343, 41 Am. St. Rep. 795, 19 S. E. 280; *Akin v. Jones*, 98 Tenn. 353, 42 Am. St. Rep. 921; *Bowman v. First Nat. Bank*, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211; *Hallam v. Tillinghast*, 19 Wash. 20, 52 Pac. 329; *In re Bank of Madison*, 5 Bliss. 515, Fed. Cas. No. 890; *Balbach v. Frelinghuysen*, 15 Fed. 675; *Beal v. City of Somerville*, 50 Fed. 647; *Levi v. National Bank of Missouri*, 5 Dill. 104, Fed. Cas. No. 8289. Whether or not there is a distinction in this connection between the proceeds of paper deposited by a stranger and those of paper deposited by a general depositor in the bank, there seems to be a conflict of authority. In *Tinkham v. Heywood*, 31 Ill. 519, there is held to be no such distinction. In the principal case of *Plano Mfg. Co. v. Auld*, ante, p. 769, however, the court holds that there is a valid ground for differentiation between the two cases, and cites *Thompson on Corporations*, section 7097, in support of the holding. The two authorities cited by Mr. Thompson (*Ryan v. Paine*, 66 Miss. 678, 6 South. 320; *Kinney v. Paine*, 68 Miss. 258, 8 South. 747), hardly support such a distinction, and it may well be doubted whether it exists.

By the weight of authority, the bank, upon crediting the owner of the paper deposited for collection with the proceeds of such paper when collected, becomes the owner of such proceeds, and establishes the relation of debtor and creditor between itself and the depositor. This is, as we have seen, because it is a universal custom of bankers so to credit the proceeds, and because, in the absence of agreement to the contrary, the parties will be presumed to have contracted with a view to this custom. In a number of cases, however, this doctrine seems to have been entirely overlooked, and the proceeds in the hands of the bank are deemed to be held by it as agent for the principal and to constitute a trust fund when mingled with the money of the agent. "It would hardly be safe to say," says the court in *Thompson v. Gloucester Sav. Inst.*, 8 Atl. 97, "that an agent could make himself a debtor, simply as distinguished from agent, by a confusion of the moneys or goods of his principal, and by then giving his principal credit for their value, or the amount collected." Such a criticism, of course, overlooks the real ground of the contrary doctrine as already stated, but seems nevertheless to have been adopted in a number of cases: *Bank of Florence v. United States etc. Co.*, 104 Ala. 297, 16 South. 110; *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544, 41 N. E. 956; *Nurse v. Satterlee*, 81 Iowa, 491, 46 N. W. 1102; *First Nat. Bank v. Sanford*, 62 Mo. App. 394; *Anheuser-Busch Brewing Assn. v. Morris*, 36 Neb. 31, 53 N. W. 1037; *Kinney v. Paine*, 68 Miss. 258, 8 South. 747; *Thompson v. Gloucester etc. Inst.* (N. J.), 8 Atl. 97; *Arnot v. Bingham*, 9 N. Y. Supp. 68, 55 Hun, 553; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214.

3. **Where Bank does not Receive Cash in Payment.**—There is no doubt that an agent for collection has not, unless specially

authorized, the authority to receive payment in anything but cash: *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029; *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118, 19 Atl. 55; *Essex County Bank v. Bank of Montreal*, 7 Biss. 193, Fed. Cas. No. 4532; *Ward v. Smith*, 7 Wall. 447. Upon elementary principles of agency, therefore, if such an agent does accept anything but cash in payment, he will be liable to his principal for any loss the latter may incur thereby. When, however, an agent for collection has accepted a draft or check from the drawee, and has delivered up to him the paper deposited for collection, the question who holds title to such paper frequently arises. In *National Bank v. American Exch. Bank*, 151 Mo. 320, 74 Am. St. Rep. 527, 52 S. W. 265, and in *Fifth Nat. Bank v. Ashworth*, 123 Pa. St. 212, 16 Atl. 596, it is said that an agent with whom paper is deposited for collection, who receives a check or draft in payment therefor, and surrenders the paper deposited therefor, "makes the check received his own, and his liability becomes fixed as much so as if he had received the cash." In *National Bank of Commerce v. Johnson*, 6 N. Dak. 180-186, 69 N. W. 49, the following language is used: "The true doctrine is that, up to the moment of receiving cash, the relation of principal and agent remains unaltered. Whatever change of form the principal's property undergoes while in the hands of the agent, it is still the property of the principal, and may be followed by him as such. If the agent surrenders the paper it holds, and receives other paper in its place, the owner of the original paper may claim the substituted paper, or he may repudiate the unwarranted action of his agent, and claim the original paper in the hands of the debtor."

When the draft deposited for collection is not surrendered, it is presumed that the check was received to become operative as a payment in fact only when paid by the drawee: *Morris v. Eufaula Nat. Bank*, 106 Ala. 383, 18 South. 11. See, also, *Levi v. National Bank of Missouri*, Fed. Cas. No. 8289, 5 Dill. 104; *Harrison Nat. Bank v. Ellicott*, 31 Kan. 173, 1 Pac. 593; *Kirkham v. Bank of America*, 165 N. Y. 132, 80 Am. St. Rep. 714, 58 N. E. 753.

4. **Where Bank Receives Proceeds of Collection After Becoming Insolvent.**—It is well settled that if collection has not been completed before the agent becomes insolvent, any money thereafter received is the property of the principal, and no change of the relation of principal and agent to that of creditor and debtor can be effected after the insolvency of the agent: *Flaumery v. Coates*, 60 Mo. 444; *National Butchers' etc. Bank v. Wilkinson*, 10 N. Y. St. Rep. 290; *National Butchers' etc. Bank v. Hubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515, 22 N. E. 1081; *Gordon v. Basines*, 25 N. Y. Supp. 767, 5 Misc. Rep. 192; *Jones v. Kilbreth*, 49 Ohio St. 401, 31 N. E. 346; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *Ger-*

man-American Nat. Bank v. Third Nat. Bank, Fed. Cas. No. 5350; Levi v. National Bank of Missouri, Fed. Cas. No. 8280, 6 Dill. 104.

5. Title as Between Remitting and Correspondent Banks to Paper Sent Latter for Collection.—From the fact that paper deposited for collection is frequently payable by a party residing elsewhere than at the place of deposit, it becomes necessary in such cases to employ a bank at the place of his residence to effect such collection. This is usually done by the bank with whom the deposit is made, remitting the paper to a correspondent, and the relations of the parties thereupon become complicated by the presence of a third party. In such cases it becomes necessary to consider the relation between the two banks as well as between the owner of the paper deposited for collection and the correspondent bank to whom the paper is sent.

The general rule is that the title to commercial paper received for collection by a bank and forwarded to its correspondent in the usual course of business does not vest in such correspondent. The relation between the two banks (as between the depositor and the forwarding bank) is that of principal and agent merely. The correspondent bank receives such paper as an agent for collection, and the title does not pass: Williams v. Jones, 77 Ala. 234; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 198; Midland Nat. Bank v. Brightwell, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 904; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; Commercial Bank of Clyde v. Marine Bank, 37 How. Pr. 432; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 35, 6 S. W. 802; Richardson v. Continental Nat. Bank, 94 Fed. 450, 36 C. C. A. 315; Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, 13 Sup. Ct. Rep. 533; Fifth Nat. Bank v. Armstrong, 40 Fed. 46; Marine Bank v. Fulton Bank, 2 Wall. 252-256. "Title passes only by a contract to that effect, to be either expressly proved or inferred from an unequivocal course of dealing": National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632. In determining what constitutes such "unequivocal course of dealing," the inferences and presumptions to be drawn are much the same as those permitted where the question arises between a depositor and a bank with whom paper is deposited. The mere fact that credit is given on receipt of the paper by the correspondent bank is not sufficient. Such credit is provisional only, and may be withdrawn if the paper be not paid: Commercial Bank of Clyde v. Marine Bank, 37 How. Pr. 432. In the headnote to this case the general rule is well stated: "If the receiving bank is at liberty, in pursuance of a general arrangement between it and the remitting bank, to credit the paper on receiving it, and does so to form a fund upon which the remitting bank is

entitled to draw immediately, then the ownership of the paper as between the banks is in the receiving bank; but where the paper is transmitted to the receiving bank for collection merely, and is to be credited to the remitting bank when received by the receiving bank, then the title does not pass to the receiving bank." In order, however, to pass title to the "correspondent" or "receiving" bank, it must become absolutely responsible for such paper: *Scott v. Ocean Bank*, 23 N. Y. 289; and even the fact that the remitting bank had the right to draw against such paper before it was actually collected, will not be sufficient in itself to show that title has passed, provided the credit so given is provisional only: *Fifth Nat. Bank v. Armstrong*, 40 Fed. 46.

6. **Title as Between Remitting and Correspondent Banks to Proceeds of Paper Sent to the Latter for Collection.**—When, however, the paper has once been collected by the correspondent bank, and it has received the proceeds therefor, the relation between the remitting bank and itself is changed from that of principal and agent to that of debtor and creditor, and title to such proceeds will, in the absence of an agreement to the contrary, vest in the correspondent bank. The banks are presumed to contract in view of "the well-known and established custom of banks, when acting as collecting agents for other banks, or, indeed, for any customer, to put all collections made by them into the general fund of the bank, unless directed to make of them a special deposit, and use them from hour to hour and from day to day in the transaction of their current business": *First Nat. Bank v. Davis*, 114 N. C. 343, 41 Am. St. Rep. 795, 19 S. E. 280. In such cases it is seldom contemplated, in the absence of express agreement, that the funds be kept separate from the general funds of the bank, and remittances when made are invariably made by the use of credits without any reference to the identity of the funds received: *Commercial Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. Rep. 533. In such a case it would, as was said by Miller, J., in *Marine Bank v. Fulton Bank*, 2 Wall. 252, "be a waste of argument to attempt to prove this a debtor and creditor relation," and title is uniformly held to pass to the correspondent bank: *State v. Southern Bank*, 33 La. Ann. 957; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193; *Romanski v. Thompson (Miss.)*, 11 South. 828; *People v. City Bank of Rochester*, 93 N. Y. 582; *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. Rep. 533; *Marine Bank v. Fulton Bank*, 2 Wall. 252.

The parties may, nevertheless, either by a course of dealing between them or by express contract, overcome the presumption that they intended to be bound by this customary mode of dealing between banks, and title will not pass to the correspondent bank in

such case. Thus, in *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802, the court says: "If the securities had been sent for collection merely, the proceeds to be credited to the New York bank, it is clear that after their collection the relation of debtor and creditor would have subsisted, and the latter would have had no claim upon the funds. But by the understanding between the banks and the actual transaction between the parties as shown by the agreed evidence, a special agency was created, and the city bank had no authority to hold and credit the proceeds of the notes, but was bound to remit them immediately to its correspondent." And whatever the understanding of the parties, if, before receiving the proceeds of paper remitted to it for collection, the correspondent bank becomes insolvent, it is not thereafter empowered to alter the relation of principal and agent to that of debtor and creditor by mingling the proceeds collected after its insolvency with its general funds, and crediting the amount to the remitting bank. When a bank ceases to do business as such, it loses the right to appropriate to itself the proceeds of the principal's property and to substitute for the money its own liability as for a debt: *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193; *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Richardson v. Continental Nat. Bank*, 94 Fed. 450, 36 C. C. A. 315; *First Nat. Bank v. Armstrong*, 42 Fed. 193; *In re Armstrong*, 33 Fed. 405.

7. **Title as Between Correspondent Bank and Depositor.**—Upon the question of whether the correspondent bank, selected by the bank with whom paper is deposited for collection, is the agent of the owner of such paper, or is merely the agent of the bank employing it, there is a very decided conflict of authority. The question is, however, only very indirectly connected with the question in whom title to such paper resides, and the authorities are moreover collected and fully discussed in the notes in *Isham v. Post*, 38 Am. St. Rep. 776, 777, and *Davis v. King*, 50 Am. St. Rep. 123. See, also, *Schumacher v. Trent*, 18 Tex. Civ. App. 17, 45 S. W. 460.

The most frequent case, and perhaps the only case, in which a conflict arises between the depositor and the correspondent bank as to which of them holds title to paper deposited by the former for collection and remitted to the latter, is where the correspondent seeks to hold such paper or its proceeds for advances made by it to the remitting bank or for a balance of account due it from such remitting bank. The rule in such case is that if the correspondent, without knowledge that the paper is the property of depositor become a purchaser for value, it will be protected even as against the real owner: *Commercial Bank of Clyde v. The Marine Bank*, 37 How. Pr. 432. The difficulty, however, lies in determining what facts fasten such knowledge upon it, and what is sufficient to render it a purchaser for value.

A blank or unrestricted indorsement is, of course, *prima facie* evidence of ownership in the indorsee, and in itself is not notice to the correspondent bank that the paper was deposited with the remitting bank for collection only, and that the latter has not title: *Wyman v. Colorado Nat. Bank*, 5 Colo. 30, 40 Am. Rep. 133; *Doppeet v. National Bank of the Republic*, 74 Ill. App. 429; *Rathbone v. Sanders*, 9 Ind. 217; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Charlotte Iron Works v. American Exchange Nat. Bank*, 34 Hun, 26; *Vickrey v. State Sav. Assn.*, 21 Fed. 773. An indorsement, on the other hand, which specifies the deposit with the remitting bank to be "for collection" is notice to all parties that the depository is not the owner of the paper so indorsed, and the correspondent bank cannot then be said to take without knowledge of that fact: *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *City Bank of Sherman v. Weiss*, 67 Tex. 331, 60 Am. Rep. 29; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *Sweeny v. Easter*, 1 Wall. 166; *Peck v. First Nat. Bank*, 43 Fed. 357; and whatever the form of the indorsement if the correspondent or collecting bank had notice that the paper was not that of the remitting bank, but was deposited with it for collection only, it will not be entitled to retain the proceeds of such paper as against the real owner: *Van Amee v. Bank of Troy*, 8 Barb. 312; *Hoffman v. Miller*, 9 Bosw. 334; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Carroll v. Exchange Bank*, 30 W. Va. 518, 8 Am. St. Rep. 101, 4 S. E. 440; *Bank of Metropolis v. New England Bank*, 6 How. 212.

Upon the question of what is necessary to constitute the collecting bank a holder for value, the cases are in conflict. One line of authorities, following the case of *Bank of Metropolis v. New England Bank*, 1 How. 234, holds that "If, in the mutual dealings between two banks, the collecting bank regards and treats the transmitting bank as the owner of the paper transmitted for collection, and has no notice to the contrary, and upon the credit of such remittance made or anticipated in the course of dealing between them, balances are from time to time suffered to remain in the hands of the bank sending the remittance, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to retain, against the real owner of the paper, for the balance of account due from the bank transmitting such paper." According to this view, the existing indebtedness or general balance due the collecting bank is as valid in rendering it a purchaser for value (or entitling it to a lien) as an actual payment for such paper. "We do not perceive any difference in principal," says Taney, C. J., in the case mentioned, "between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case, as well as in the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties": See *Wyman v. Colorado Nat. Bank*, 5 Colo.

30, 40 Am. Rep. 133; Rathbone v. Sanders, 9 Ind. 217; Milliken v. Shapleigh, 36 Mo. 596, 88 Am. Dec. 171; United States Nat. Bank v. Geer, 53 Neb. 67, 73 N. W. 266; Jones v. Milliken, 41 Pa. St. 252; First Nat. Bank v. Gregg, 79 Pa. St. 384; Winfield Nat. Bank v. McWilliams, 9 Okla. 493, 60 Pac. 229; Carroll v. Exchange Bank, 30 W. Va. 518, 8 Am. St. Rep. 101, 4 S. E. 440; Vickery v. State Sav. Assn., 21 Fed. 773; New England Bank v. Bank of Metropolis, 1 How. 234, 6 How. 212. But even under this view, where no new credit is given or advances made, and the mutual dealings between the parties do not establish the fact that credit was given on the faith of the paper transmitted or expected to be received, the collecting bank has no right to retain the money as against the real owner: American Exchange Nat. Bank v. Thurber, 94 Ill. App. 622; Jones v. Milliken, 41 Pa. St. 252; First Nat. Bank v. Gregg, 79 Pa. St. 384; Hackett v. Reynolds, 114 Pa. St. 328, 6 Atl. 689; Wilson v. Smith, 8 How. 763.

The opposite doctrine is that which prevails in the courts of New York, Mississippi, and Connecticut. According to it "a bank, receiving from another negotiable paper for collection, obtains no better title to it or the proceeds than the remitting bank had, unless it becomes a purchaser for value, or makes new advances on the faith of it, without notice of any defect of title; and it does not become such purchaser, or make such advances by reason of its having a balance against the remitting bank, for which it had refrained from drawing, or from having made further advances after the receipt of the negotiable paper, in reliance upon a course of dealing between the banks without any special reference to it": Lindauer v. Fourth Nat. Bank, 55 Barb. 75. See Lawrence v. Stonington Bank, 6 Conn. 521; First Nat. Bank v. Strauss, 66 Miss. 479, 14 Am. St. Rep. 579, 6 South. 232; Hutchinson v. Manhattan Co., 9 Misc. Rep. 343, 29 N. Y. Supp. 1103; Stark v. United States Nat. Bank, 41 Hun, 506; Dod v. Fourth Nat. Bank, 59 Barb. 265; Lindauer v. Fourth Nat. Bank, 55 Barb. 75; Hoffman v. Miller, 9 Bosw. 334; McBride v. Farmers' Bank of Salem, 25 Barb. 657; affirmed in 26 N. Y. 450; Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632. See, also, in this connection the monographic note to First Nat. Bank v. Strauss, 14 Am. St. Rep. 583.

e. Deposits Fraudulently Received by Bank While Insolvent.—

A numerous class of cases is that in which deposits are received by an insolvent bank, known by its officers to be insolvent. Under such circumstances, it is said by a few of the cases, title to the deposit does not pass to the bank, but it remains the property of the depositor: Chicago etc. Trust Co. v. Household Guest Co., 88 Ill. App. 126; Importers' etc. Bank v. Peters, 123 N. Y. 272, 25 N. E. 319:

Richardson v. Olivier, 105 Fed. 277, 44 C. C. A. 468; *Richardson v. New Orleans Coffee Co.*, 102 Fed. 785, 43 C. C. A. 583; *Richardson v. Denegre*, 98 Fed. 572, 35 C. C. A. 452; *Richardson v. New Orleans etc. Co.*, 102 Fed. 780, 43 C. C. A. 583. In all of these cases, however, it will be found that such remarks are either dicta or else inaccurate statements of the undoubted doctrine that the receipt of deposits by a bank known to be insolvent by its officers is a fraud upon the depositor and renders the bank or its assignee a trustee *ex maleficio* and the deposit a trust fund, recoverable by the depositor. Title in such cases does pass to the bank, but it takes title through fraud, and by a contract voidable for that reason at the election of the depositor. "The keeping the bank open, and the conducting of its business in the usual manner, constitute a representation to its customers of the solvency of the bank upon which they had a right to rely; and if the bank was known to be insolvent by the officers who were charged with its management, the concealment of that fact from a person about to make a deposit would constitute a fraud upon him": *Wasson v. Hawkins*, 59 Fed. 233. And it is upon this ground, and not upon the theory that the bank does not take title to such deposit, that such deposits are uniformly held recoverable by the depositor: *American Trust etc. Bank v. Gueder & Paeschke Mfg. Co.*, 150 Ill. 336, 37 N. E. 227; *Union Nat. Bank v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 119, 27 N. E. 907; *First Nat. Bank v. Strauss*, 66 Miss. 479, 14 Am. St. Rep. 579, 6 South. 232; *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; *Perth etc. Gaslight Co. v. Middleton County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Alstyne v. Crane*, 4 Thomp. & C. 113; *Cragle v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Rochester Printing Co. v. Loomis*, 45 Hun, 93; affirmed in 120 N. Y. 659, 24 N. E. 1103; *New York etc. Co. v. Higgins*, 79 Hun, 250, 29 N. Y. Supp. 416; *Spring Brook Chemical Co. v. Dunn*, 57 N. Y. Supp. 100, 39 App. Div. 130; *Craigie v. Smith*, 14 Abb. N. C. 409; *Corn Exchange Nat. Bank v. Solicitors' etc. Co.*, 188 Pa. St. 330, 68 Am. St. Rep. 872, 41 Atl. 536; *Freiberg v. Cox*, 97 Tenn. 550, 37 S. W. 283; *Bruner v. First Nat. Bank*, 97 Tenn. 540, 37 S. W. 286; *Parker v. Crawford*, 3 Wills. Civ. Cas. Ct. App. (Tex.) 365; *St. Louis etc. Ry. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. Rep. 390; *Wasson v. Hawkins*, 59 Fed. 233; *Quin v. Earle*, 95 Fed. 728; *Somerville v. Beal*, 49 Fed. 790.

There is, however, in this connection one class of cases in which it may very properly be said that no title to the money received by a bank passed to it, because of its insolvency at the time of the receipt of the fund. Where a check or draft is deposited with a bank for collection, it remains, we have seen, the property of the depositor, and this relation continues until the bank receives the proceeds of collection, and, under an implied authority, credits them to the account of the depositor, thereby establishing the relation of debtor and creditor in place of that of principal and agent

previously existing. Where, however, before the money is actually received and credited to the depositor, the bank becomes insolvent, "its agency to constitute itself a general debtor for the amount ceases, and it receives and holds the proceeds of collection as an agent for the depositor": *Levi v. National Bank of Missouri*, Fed. Cas. No. 8289, 5 Dill. 104. No title to such proceeds ever passed to the bank: *National Butchers' etc. Bank v. Wilkinson*, 10 N. Y. St. Rep. 290; *National Butchers' etc. Bank v. Hubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515, 22 N. E. 1081; *Jones v. Kilbreth*, 49 Ohio St. 401, 31 N. E. 346; *Bruner v. Bank*, 97 Tenn. 540, 37 S. W. 286; *German-American Nat. Bank v. Third Nat. Bank*, Fed. Cas. No. 5359; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *In re Armstrong*, 33 Fed. 405; *Levi v. National Bank of Missouri*, Fed. Cas. No. 8289, 5 Dill. 104.

II. Right to Recover Upon Insolvency of Bank.

a. **General Deposit.**—Intimately connected with the question when the title to money deposited with, or collected by, a bank passes from the customer to the banker are the questions relating to the recovery of such funds by the customer in the event of the bank becoming insolvent. As to the rights where the money involved was a mere general deposit, the rule is well settled that such depositor is, in the absence of statute, entitled to no preference over any other creditors. The title to money placed in a bank on general deposit passes to the bank, as we have seen (*supra*, p. 776), immediately upon its receipt by the latter. It becomes the property of the bank, and the depositor receives in exchange the mere obligation of the bank to repay the amount of the deposit on demand. The relation between the depositor and the banker has in it nothing of a fiduciary nature, but is simply that of debtor and creditor, and in case the bank becomes insolvent, such depositor stands on the same plane with other creditors and is entitled to no priority: See cases cited *supra*, p. 777; and *Star Cutter Co. v. Smith*, 87 Ill. App. 212; *Fletcher v. Sharpe*, 108 Ind. 276, 9 N. E. 142; *Paul v. Draper*, 158 Mo. 197, 81 Am. St. Rep. 296, 59 S. W. 77; *Schmelling v. State*, 57 Neb. 562, 78 N. W. 279; *Bank of Blackwell v. Dean*, 9 Okla. 626, 60 Pac. 226.

b. **Special Deposit.**—Where, however, the deposit is a special one, the relation is one of bailor and bailee (*supra*, p. 778). the title to the money deposited remains in the depositor, and the deposit forms, properly speaking, no part of the assets of the bank. Upon the insolvency of the bank, they do not pass to the receiver as the property of the bank, but as property belonging to the depositor to which he is entitled upon demand. Such depositor is not, therefore, relegated to the position occupied by other creditors, but may recover such money from the receiver. Up to this point there is no question of priority of claims involved. The depositor simply

sues to recover his own property, to which the general creditors have no claim: *Chicago etc. Trust Co. v. Household etc. Co.*, 88 Ill. App. 126; *In re Commercial Bank*, 2 Ohio Dec. 304; *Anderson v. Pacific Bank*, 112 Cal. 508, 53 Am. St. Rep. 228, 44 Pac. 1063. If, however, the banker mingles the special deposit with the general funds, he becomes a trustee by reason of such conversion, and the right of the depositor to recover then involves a question of priority, which is to be determined by the rules governing the tracing of trust funds: See post, pp. 801-807. If, however, he can sufficiently trace and identify the deposit, his claim will be preferred to that of the general creditors and he will be entitled to recover the deposit from the receiver: *Merchants' Nat. Bank v. School District*, 36 C. C. A. 432, 94 Fed. 705. Nor is this right to impress a trust on the assets of the bank lost by the receipt of a draft in part payment in reliance upon false representations as to the bank's condition: *In re Johnson*, 103 Mich. 100, 61 N. W. 352.

c. Deposit of Negotiable Paper.

1. **Received as Cash.**—Where paper is deposited in a bank, it may have been received either as amounting to so much cash, or as a deposit for collection merely. If it be treated as cash, the transaction is in effect a purchase of it by the bank, and title passes to the latter: *Supra*, p. 781. Accordingly, in such a case, the depositor becomes a mere general creditor of the bank, and is not entitled to the paper itself or to any preference over other creditors in the recovery of the amount of such paper when the bank becomes insolvent: *Lauterman v. Travais*, 73 Ill. App. 670; *Wasson v. Lamb*, 120 Ind. 514, 16 Am. St. Rep. 342, 22 N. E. 729; *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. 387; *In re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336; *Balbach v. Frelinghuysen*, 15 Fed. 675.

2. **Deposited for Collection.**—On the other hand, where such paper was deposited for collection only, until collected it remains the property of the depositor (*supra*, p. 782), and the bank is merely his agent for collection. Accordingly, where the agent becomes insolvent before it has collected the paper deposited, the owner may reclaim such paper from the receiver of the bank: *Griffin v. Chase*, 36 Neb. 328, 54 N. W. 572; *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365; *Balbach v. Frelinghuysen*, 15 Fed. 675.

d. **Proceeds of Collection Received by Bank After Insolvency.**—So if the bank became insolvent before receiving the proceeds of the paper deposited for collection, it is well settled that such proceeds may be recovered from the receiver of the bank. The bank had no title to the paper at the time of its insolvency and cannot, by receiving and crediting the proceeds after its insolvency, change the relation of principal and agent to that of debtor and creditor. Such proceeds form no part of the assets of the bank and are held

by the receiver as bailee for the owner: *Flannery v. Coates*, 89 Mo. 444; *National Butchers' etc. Bank v. Wilkinson*, 10 N. Y. St. Rep. 290; *National Butchers' etc. Bank v. Hubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515, 22 N. E. 1031; *Gordon v. Rasines*, 25 N. Y. Supp. 767, 5 Misc. Rep. 192; *Jones v. Kilbreth*, 49 Ohio St. 401, 31 N. E. 346; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *Levi v. National Bank of Missouri*, Fed. Cas. No. 8289, 5 Dill. 104; *German-American Nat. Bank v. Third Nat. Bank*, Fed. Cas. No. 5359. And likewise where, either by special agreement or by the course of dealing between the parties, the bank receiving the proceeds of collection does not become the owner thereof, the depositor can recover such proceeds from the receiver of the bank if it become insolvent after receiving them. They are held by the bank as a special deposit, and the depositor is not compelled to accept a pro rata payment of his claim in common with the general creditors, but is entitled to priority: *In re Johnson*, 103 Mich. 109, 61 N. W. 352; *Wallace v. Stone*, 107 Mich. 190, 65 N. W. 113; *German Ins. Co. v. Kimble*, 66 Mo. App. 371; *Griffin v. Chase*, 36 Neb. 328, 54 N. W. 572; *People v. Dansville Bank*, 39 Hun, 187; *Continental Nat. Bank v. Werns*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802. See, however, *Philadelphia Nat. Bank v. Dowd*, 38 Fed. 172.

e. Proceeds of Collection Received by Bank Before Insolvency.—

Where paper is deposited with a bank for collection, such bank is, as we have seen, merely an agent until the proceeds are received by it. By the weight of authority, it may then, in the absence of special agreement to the contrary, credit the proceeds of collection to the depositor and establish the relation of debtor and creditor. This is in accordance with a custom of bankers so universal that the parties are deemed to contract with it in view. From the moment, therefore, that such proceeds are received by the bank and credited to the depositor, the bank becomes the owner of them, and the depositor becomes merely a general creditor of the bank. If, then, the bank should thereafter become insolvent, such depositor is entitled to no priority, but must accept a pro rata distribution in common with the other general creditors of the bank: *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Billingsley v. Pollock*, 69 Miss. 759, 30 Am. St. Rep. 585, 13 South. 828; *People v. City Bank*, 93 N. Y. 582; *People v. Merchants' etc. Bank*, 78 N. Y. 269, 34 Am. Rep. 532; *Gordon v. Rasines*, 5 Misc. Rep. 192, 25 N. Y. Supp. 767; *Commercial Bank v. Davis*, 115 N. C. 226, 20 S. E. 370; *Commercial Bank v. Davis*, 114 N. C. 343, 41 Am. St. Rep. 795, 19 S. E. 280; *Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921, 27 S. W. 669; *Bowman v. First Nat. Bank*, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211; *Hallam v. Tillinghast*, 19 Wash. 20, 52 Pac. 329; *In re Bank of Madison*, 5 Biss. 515, Fed. Cas. No. 890; *Beal v. Somerville*, 50 Fed. 647; *Balbach v. Frelinghuysen*, 15 Fed. 675; *Levi v. National Bank of Missouri*, Fed.

Cas. No. 8289, 5 Dill. 104. This doctrine of an implied authority to credit the proceeds of collection and so transform the contract of agency into one of debt is not recognized by one line of authorities, and in such cases it is uniformly held that the proceeds of collection are a trust fund in the hands of the agent, and so long as they can be traced are entitled to a priority over the claims of general creditors: *Bank of Florence v. United States etc. Co.*, 104 Ala. 297, 16 South. 110; *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544, 41 N. E. 956; *Nurse v. Satterlee*, 81 Iowa, 491, 40 N. W. 1102; *Kinney v. Paine*, 68 Miss. 258, 8 South. 747; *First Nat. Bank v. Sanford*, 62 Mo. App. 394; *Anheuser Brewing Co. v. Morris*, 38 Neb. 31, 53 N. W. 1037; *Thompson v. Gloucester etc. Ins. (N. J.)*, 8 Atl. 97; *Arnot v. Bingham*, 9 N. Y. Supp. 68, 55 Hun, 553; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214.

f. Recovery by Remitting Bank from Insolvent Correspondent Bank.

1. **Of Paper Remitted for Collection.**—Where negotiable paper deposited in one bank for collection is by it remitted to a correspondent with instructions to collect, the correspondent bank is a mere agent for the remitting bank: *Supra*, p. 789. While, therefore, the paper remains in its hands uncollected, it is the property of the remitting bank, and upon the insolvency of the agent, the paper does not, properly speaking, form a part of the assets of the bank in the hands of the receiver. It still remains the property of the remitting bank, and may be recovered by it from the assignee of its correspondent: *Williams v. Jones*, 77 Ala. 294; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193; *Commercial Bank of Clyde v. Marine Bank*, 37 How. Pr. 432; *Richardson v. Continental Nat. Bank*, 94 Fed. 450, 36 C. C. A. 315; *Commercial Bank etc. v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. Rep. 533.

2. **Of Proceeds of Paper Remitted for Collection.**—Upon the proceeds being received by the correspondent bank, however, a different question arises. At this point, unless there be an agreement or a course of dealing to the contrary, the correspondent bank may credit such proceeds to the remitting bank and so become its debtor instead of its agent: *Supra*, p. 790. The banks are supposed to contract in view of the established customs of banks and of these none is better established than the custom between banks to mingle the proceeds of paper sent them for collection by another bank with their own funds and to settle by remittances from or credits on their general funds: *First Nat. Bank v. Davis*, 114 N. C. 343, 41 Am. St. Rep. 795, 19 S. E. 280. Accordingly, in such case, should its correspondent become insolvent after crediting the proceeds to the remitting bank, title thereto has passed to the former and the

latter is entitled to no priority over other creditors of the insolvent bank: *State v. Southern Bank*, 33 La. Ann. 957; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193; *People v. City Bank*, 98 N. Y. 582; *First Nat. Bank v. Davis*, 114 N. C. 343, 41 Am. St. Rep. 795, 19 S. E. 280; *Commercial Bank etc. v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. Rep. 533.

Where, however, the parties have by a course of dealing or by express agreement indicated their intention that title to the proceeds should not pass, the correspondent bank may not make the remitting bank a mere general creditor by mingling such funds with its own, but if it does so, they will form a trust fund, which the remitting bank may trace and recover from the receiver as a claim taking priority over those of general creditors: *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802.

Even if it was intended that the correspondent bank should take title to the proceeds, it cannot do so, if it becomes insolvent before their receipt. In such case they remain the property of the remitting bank, and may be recovered by it from the receiver: *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193; *Commercial Bank etc. v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. Rep. 533; *Richardson v. Louisville Bank*, 94 Fed. 442; *Richardson v. Continental Nat. Bank*, 94 Fed. 450, 36 C. C. A. 815; *First Nat. Bank v. Armstrong*, 42 Fed. 193.

g. Recovery by Depositor from Correspondent Bank Upon Insolvency of Remitting Bank.

1. **In General.**—A class of cases of quite frequent occurrence is that in which recovery is sought by one who has deposited negotiable paper for collection in a bank which has remitted such paper to its correspondent, where the paper or the proceeds of its collection remain in the hands of the correspondent bank upon the insolvency of the remitting bank. This question has already been considered (see *supra*, pp. 792, 793), and its solution has been seen to depend upon whether or not the correspondent bank was a purchaser without notice of the plaintiff's title, and for a valuable consideration. The right of a correspondent bank in such case to retain the paper or the proceeds of its collection as against the owner for a debt due it from the transmitting bank has also been discussed: *Supra*, pp. 791, 792. There remains to be considered the question of when paying or crediting the proceeds of such paper to the remitting bank will amount to a good defense by the correspondent bank in an action against it to recover such proceeds where the remitting bank is insolvent.

2. **Where Correspondent Bank has Credited or Remitted Proceeds to Remitting Bank.**—If, prior to the insolvency of the remitting bank, the proceeds were actually remitted to it by its correspondent, there can be no question but that the latter is discharged

from liability. By making the remitting bank his agent to collect, the depositor necessarily made it his agency to receive payment: *Boykin v. Bank of Fayetteville*, 118 N. C. 566, 24 S. E. 357; *Evansville Bank v. German-American Bank*, 155 U. S. 556, 15 Sup. Ct. Rep. 221. But in order to have this effect, there must be payment to the remitting bank. It is not sufficient to discharge the correspondent bank that it has credited the remitting bank with the proceeds of the paper sent by it for collection. "The custom of transmitting bills for collection from one bank to another and crediting in account the avails received, whatever effect it may have between themselves, cannot affect the claims of a third person who has confided the collection of a bill to one of them, without assent, either express or implied, to the mode of transacting their business": *Lawrence v. Stonington Bank*, 6 Conn. 521. See, also, *American Exchange Bank v. Loretta Gold etc. Min. Co.*, 165 Ill. 103, 56 Am. St. Rep. 233, 46 N. E. 202; *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431, 14 S. W. 411; *Tyson v. Western Nat. Bank*, 77 Md. 412, 26 Atl. 520; *Bury v. Woods*, 17 Mo. App. 245; *Arnold v. Clark*, 1 Sand. 491; *Bank of Clarke County v. Gilman*, 81 Hun, 486, 30 N. Y. Supp. 1111, affirmed in 152 N. Y. 634, 46 N. E. 1145; *Stevenson v. Fidelity Bank*, 113 N. C. 485, 18 S. E. 695; *Boyken v. Bank of Fayetteville*, 118 N. C. 566, 24 S. E. 357; *National Exchange Bank v. Beal*, 50 Fed. 355; *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. 880.

Where once the remitting bank has become insolvent, no dealing with it by the correspondent bank can affect the right of recovery from the latter by the owner. Neither by paying nor by crediting the proceeds of collection to the remitting bank after its insolvency, can the correspondent bank in any way prejudice the rights of third parties: *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Stevenson v. Fidelity Bank*, 113 N. C. 485, 18 S. E. 695; *Boyken v. Bank of Fayetteville*, 118 N. C. 566, 24 S. E. 357; *Reeves v. State Bank*, 8 Ohio St. 465; *Evansville Bank v. German-American Nat. Bank*, 155 U. S. 556, 15 Sup. Ct. Rep. 221. And it is immaterial whether or not the correspondent bank knew of the insolvency of the remitting bank at the time of the settlement between them: *Evansville Bank v. German-American Nat. Bank*, 155 U. S. 556, 15 Sup. Ct. Rep. 221.

h. Recovery of Deposit Fraudulently Received by Insolvent Bank.—Where money or negotiable paper is deposited in an insolvent bank, known by its officers to be hopelessly insolvent, the contract may be rescinded upon the ground of fraud, and such deposit becomes a trust fund in the hands of the receiver of the bank. Like any other trust fund, if it may be traced and is capable of identification, it may be recovered from the assignee of the insolvent bank, and the claim of such depositor is accordingly one

which has priority over the claims of general creditors. If the deposit was in the form of a check or draft, remaining uncollected in the hands of the receiver, such paper may be reclaimed: *First Nat. Bank v. Strauss*, 66 Miss. 479, 14 Am. St. Rep. 579, 6 South. 232; *American Trust etc. Bank v. Gulder etc. Mfg. Co.*, 150 Ill. 336, 37 N. E. 227; *Richardson v. Denegre*, 93 Fed. 572, 35 C. O. A. 452. And if such paper has been collected and the proceeds remain in the hands of the receiver, or if the original deposit was in cash, such moneys form a trust fund recoverable from the receiver: *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Craigle v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Corn Exchange Nat. Bank v. Solicitors' etc. Co.*, 188 Pa. St. 330, 68 Am. St. Rep. 872, 41 Atl. 536; *Freilberg v. Cox*, 97 Tenn. 550, 37 S. W. 283; *St. Louis etc. Ry. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. Rep. 390; *Wasson v. Hawkins*, 59 Fed. 233; *Quin v. Earle*, 95 Fed. 728; *Somerville v. Beal*, 49 Fed. 790; *Richardson v. New Orleans Debenture etc. Co.*, 102 Fed. 780, 42 C. O. A. 619.

1. **Recovery of Funds Converted by Bank into Other Property.**—Whenever property or money received by a bank does not form part of its general assets, but is for any reason impressed with a trust in favor of another, such property or money may, we have seen, be recovered by such person from the receiver of the bank in case of the bank's insolvency. So long as the money or property so held is kept separate and distinct from the other assets of the bank, the right of recovery is clear: *Chicago etc. Trust Co. v. Household etc. Co.*, 88 Ill. App. 126.

But it is by no means essential that the money so received should be kept by the bank in the identical coin paid. Such money constitutes a trust fund, and the rule is well established that if a trust fund be invested in property the cestui que trust may follow the fund, and, fixing upon the property the character of the original fund, may claim it as his own. In the frequently quoted language of Story: "If any property in its original form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him in right (not being purchasers for value without notice), any more valid claim in respect to it than they respectively had before such claim. . . . It matters not in the slightest degree into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods or stock; for the product of the substitute for original thing still follows the nature of the thing itself, so long as it can be ascertained to be such. The right ceases only when the means of ascertainment fail": 2 Story's Equity Jurisprudence, 1258, 1259; *St. Louis Brewing Assn. v. Austin*, 100 Ala.

818, 13 South. 908; *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544, 41 N. E. 956; *District Township v. Farmers' Bank*, 88 Iowa, 194, 55 N. W. 342; *Freiberg v. Stoddard*, 161 Pa. St. 259, 28 Atl. 1111; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96; *First Nat. Bank v. Armstrong*, 36 Fed. 59.

j. Recovery of Fund Mingled with Other Funds of the Bank

1. **In General.**—More frequent and more difficult, however, is the case where the bank has mingled such trust funds with the mass of its other funds. The theory upon which a recovery of trust funds is permitted is that such funds are the property of the one seeking to reclaim them. It is said in *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96: "As the right to trace his trust fund is founded on the right of property, and not on the ground of compensation for its loss, he must be able to point out the particular property into which the fund has been converted. When he is unable to do this, the trust fails and his claim becomes one for compensation only, for the loss of the fund, and stands on the same basis as the claims of general creditors": See, also, *Englar v. Offutt*, 70 Md. 78, 14 Am. St. Rep. 332, 16 Atl. 497; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537.

On principle, therefore, and by the great weight of authority (see post, p. 804), some identification of the fund is necessary. What identification is sufficient is the question concerning which there is the greatest difficulty and the sharpest conflict of authority. According to the early English cases, money has no earmark and is therefore incapable of identification when mingled with other funds: *Deg v. Deg*, 2 P. Wms. 414. But this doctrine was early exploded, and it is now well settled, both in England and in this country, that the identical coins need not be identified, and the mere fact that they have been mingled with other coins is not of itself sufficient to bar recovery by the cestui que trust. As is said in *Farmers' etc. Bank v. King*, 57 Pa. St. 202, 98 Am. Lec. 215: "An earmark is not indispensable to enable a real owner to assert his right to property, or to its product or substitute. Evidence of substantial identity may be attached to the thing itself or it may be extraneous. . . . But in regard to money substantial identity is not oneness of pieces of coin or of bank bills. If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor to his principal. The principal may, by the law, claim out of the chest the sums which belonged to him before the admixture." The English cases are reviewed in an able opinion by Sir George Jessel, master of the rolls, in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, and the modern English doctrine is definitely stated to be that

money may be followed as a trust fund although commingled with funds of the trustee. "Equity will follow the money, even if put into a bag or indistinguishable mass, by taking out the same quantity." This doctrine is approved by the supreme court of the United States in *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 68, and is supported by a long line of authorities: *Winstandley v. Second Nat. Bank*, 13 Ind. App. 544, 41 N. E. 956; *Nurse v. Satterlee*, 81 Iowa, 491, 46 N. W. 1102; *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658; *Sherwood v. Central Michigan Sav. Bank*, 103 Mich. 109, 61 N. W. 352; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *Paul v. Draper*, 73 Mo. App. 566; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994; *Blair v. Hill*, 63 N. Y. Supp. 670, 50 App. Div. 33; *Covin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Freiburg v. Stoddard*, 161 Pa. St. 259, 28 Atl. 1111; *White v. Commercial Farmers' Bank*, 60 S. O. 122, 38 S. E. 453; *Plano Mfg. Co. v. Auld*, 14 S. Dak. 512, ante, p. 769, 86 N. W. 21; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802, *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93; *Cleveland etc. Ry. Co. v. Hawkins*, 79 Fed. 29; *Wasson v. Hawkins*, 59 Fed. 233; *Peters v. Bane*, 133 U. S. 693, 10 Sup. Ct. Rep. 354; *Richardson v. New Orleans etc. Co.*, 102 Fed. 780; *Boone County Nat. Bank v. Latimer*, 67 Fed. 27; *First Nat. Bank v. Armstrong*, 36 Fed. 59; *Beard v. Independent Dist.*, 88 Fed. 375, 31 C. O. A. 562; *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *Pennell v. Deffell*, 4 De Gex, M. & G. 372.

While the doctrine represented by these cases is undoubtedly the modern rule and the one generally accepted, there is a line of cases taking the opposite view. The entire difficulty seems to have arisen from a remark of Lord Ellenborough in *Taylor v. Plumer*, 3 Maule & S. 562, to the effect that the right to follow a trust fund only ceases when the means of ascertainment fail, "which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description." This statement, incorporated by Story into his work on Equity Jurisprudence, volume 2, page 1259, is shown by Sir George Jessel in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, 717, to have been based upon a lack of knowledge "of the refinement of equity by means of which the means of ascertainment still remain" where money is so commingled. It is, however, the doctrine of the following cases, most of whom cite the passage from Story as the authority therefor: *Union Nat. Bank v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 119, 27 N. E. 907; *Bayor v. American Trust etc. Bank*, 157 Ill. 68, 41 N. E. 622; *Mutual Acc. Assn. v. Jacobs*,

.141 Ill. 288, 38 Am. St. Rep. 802, 31 N. E. 414; *Lauterman v. Travous*, 78 Ill. App. 670-678; *Kneisley v. Weir*, 81 Ill. App. 251; *New Farmers' Bank Trustee v. Cockrell*, 21 Ky. Law Rep. 177, 51 S. W. 2; *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; *Thompson's Appeal*, 22 Pa. St. 16; *Blake v. State Bank*, 12 Wash. 619; 41 Pac. 909; *Illinois Trust etc. Bank v. First Nat. Bank*, 15 Fed. 858.

2. **Must Reach Receiver of Insolvent Bank.**—In order that a trust fund may be traced into the assets of an insolvent bank and a preference fastened upon such assets, it is by the great weight of authority necessary that the estate of the insolvent bank has been enlarged to the extent of such trust fund. Accordingly, it is generally held that such fund must be shown to have augmented the assets of the bank received by the assignee. It must be traced into the assets of the bank, which are shown to have reached the receiver. "The theory upon which property is taken from a receiver and paid to a beneficiary is that the court is able to find in the hands of the receiver property or its proceeds which was held by the insolvent, not in his own right, but charged with a trust": *Board of Fire Commrs. etc. v. Wilkinson*, 119 Mich. 655, 78 N. W. 893. See, also, *Bank of Florence v. United States etc. Co.*, 104 Ala. 297, 16 South. 110; *Winstandley v. Second Nat. Bank*, 18 Ind. App. 544, 41 N. E. 956; *Board of Fire etc. Commrs. v. Wilkinson*, 119 Mich. 655, 78 N. W. 893; *Frank v. Bingham*, 58 Hun, 580, 12 N. Y. Supp. 767; *Freiburg v. Stoddard*, 161 Pa. St. 259, 28 Atl. 1111; *White v. Commercial etc. Bank*, 60 S. C. 122, 38 S. E. 453; *Monotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96; *State v. Foster*, 5 Wyo. 199, 38 Pac. 926.

The cases of *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214, *Philadelphia Nat. Bank v. Dowd*, 38 Fed. 172, *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93, and *Bowers v. Evans*, 71 Wis. 133, 36 N. W. 629, which attempted to establish a contrary doctrine in Wisconsin, were overruled in *Monotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383, and are generally discredited. Under these cases and those which followed the doctrine laid down by them (*Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 909; *Capital Nat. Bank v. Coldwater Bank*, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 115; *Kimmel v. Dickson*, 5 S. Dak. 221, 49 Am. St. Rep. 869, 58 N. W. 561), it is sufficient to impress a trust upon the assets of the bank in the hands of its assignee to show that the money was mingled with the assets of the bank and went to swell its general estate, and by reason of these facts alone a trust will attach to the entire estate, even though the specific fund cannot be followed into the hands of the receiver. This is contrary to the great weight of authority, and goes to an extremity which "can scarcely be upheld upon equitable and

just grounds": *Windstanley v. Bank*, 13 Ind. App. 544, 41 N. E. 956.

3. **Must Form Part of Assets in the Hands of Receiver.**—By the better rule the trust fund must not only be traced into the hands of the receiver, but must be shown to form part of the gross sum held by him. As is said in *In re Cavin v. Gleason*, 105 N. Y. 258, 11 N. E. 504: "Upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim—that is, that he is a trust creditor as distinguished from a general creditor." His right to recover is based upon his right to trace his property and reclaim it from a general mass. If, then, such property forms no part of the fund which it is sought to impress with the trust, it is manifest there can be no recovery upon that theory: *St. Louis Brewing Assn. v. Austin*, 100 Ala. 313, 13 South. 908; *Perth-Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704, explaining *Frelinghuyzen v. Nugent*, 36 Fed. 229; *Shute v. Hinman*, 34 Or. 578, 58 Pac. 412, 58 Pac. 882; *Wasson v. Hawkins*, 59 Fed. 233; *Boone County Nat. Bank v. Latimer*, 67 Fed. 27.

This does not, however, mean that it must be shown that the identical coins received by the bank are in the hands of the receiver. If the fund as a fund be traced into his hands it will be sufficient. This is, of course, an extension of the modern doctrine that money will be followed though mingled with other coin; but it is supported by numerous cases: *Sherwood v. Central Michigan Sav. Bank*, 103 Mich. 109, 61 N. W. 352; *Midland Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994; *First Nat. Bank v. Sandford*, 62 Mo. App. 394; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *Thompson v. Gloucester etc. Inst. (N. J.)*, 8 Atl. 97; *Bergstresser v. Lodewick*, 59 N. Y. Supp. 630, 37 App. Div. 629; *In re Cavin v. Gleason*, 105 N. Y. 259, 11 N. E. 504; *Jones v. Kilbreth*, 49 Ohio St. 401, 31 N. E. 346; *Richardson v. New Orleans Debenture Redemption Co.*, 102 Fed. 780; *Richardson v. New Orleans Coffee Co.*, 102 Fed. 785.

4. **Presumption that Trust Funds Remain in Bank.**—Where a bank has mingled a trust fund held by it with its own general funds, any money thereafter paid out by it will be presumed to be its own, rather than that belonging to the cestui que trust. "There can be no indulgence of a presumption that a party has acted fraudulently, because of the maxim that where the act of a party may be referred indifferently to one of two motives the law prefers to refer it to that which is honest, rather than that which is dishonest": *Boone County Nat. Bank v. Latimer*, 67 Fed. 27. See, also, *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544, 41 N. E. 956; *Sherwood v. Central Mich. Sav. Bank*, 103 Mich.

109, 61 N. W. 352; Board of Commrs. v. Wilkinson, 119 Mich. 655, 78 N. W. 893; Importers' etc. Nat. Bank v. Peters, 123 N. Y. 272, 25 N. E. 319; Blair v. Hill, 50 App. Div. 33, 63 N. Y. Supp. 670; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; Taylor v. Bank (Wis.), 62 N. W. 99; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; State v. Foster, 5 Wyo. 199, 63 Am. St. Rep. 47, 38 Pac. 926; In re Hallet's Estate, L. R. 18 Ch. Div. 696.

As a result of this doctrine, it is held that where it is shown that an amount of money equal to or in excess of the amount of the trust fund was continually in the vaults of the bank from the date when the trust fund was mingled with the general funds to the date when the bank went into the hands of a receiver, it will be presumed that the trust fund was included in such money: Sherwood v. Central Michigan Sav. Bank, 103 Mich. 115, 61 N. W. 352; Blair v. Hill, 63 N. Y. Supp. 670, 50 App. Div. 33; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802. This holding is, however, criticised in Philadelphia Nat. Bank v. Dowd, 38 Fed. 172, with especial reference to the case of Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802, on the ground that it is the application of a legal fiction. "The officers of the bank had no intent to make any difference between the money collected for their correspondents and that passed over the counters of the bank by depositors. It would be equally objectionable, because equally a false assumption, to say that the money having been traced into the bank safe, and not accounted for, must be presumed to remain there until the contrary can be proved; and that the contrary not having been proved, the court will presume the money in the safe to contain that of the beneficiary. The contrary is proved to a moral certainty by all of the facts of the case. To say that it does not lie in the trustee's mouth to assert that it had been wrongfully paid out would be to invoke a doctrine of estoppel, not applicable to a receiver who represents creditors, as well as the delinquent trustee, and who must therefore be allowed to show the very truth of the matter." But whether or not it would be a sufficient defense to show that the amount of the fund was not continually in the vaults of the bank, up to the time of its failure, it seems that this is matter of defense and need not be anticipated by the plaintiff seeking to recover the trust fund from the receiver: Moreland v. Brown, 86 Fed. 257.

5. Must Actually Augment Assets of Bank.—It is well settled that the estate of the insolvent bank must actually be augmented by the money or property which it is sought to recover as a trust fund. If the transaction amounted to no more than an exchange

of creditors, the mere canceling of one liability and the assumption of another, or if the money was used in the discharge of an indebtedness, it is obvious that the assets in the hands of the receiver have not been increased thereby and there can be no recovery as of a trust fund. Thus it is said in *Insurance Co. v. Caldwell*, 59 Kan. 156, 52 Pac. 440: "The mere saving of the estate by the discharge of a general indebtedness, otherwise payable out of it, or by the payment of the current expenses of the business, is not an augmentation or betterment of the estate within the meaning of the rule. If the estate has not been increased by specific additions to it, or if what previously existed has not been improved or rendered more valuable, it has not been impressed with the trust claimed." And this is the undoubted law: *Bradley v. Cheseborough*, 111 Iowa, 126, 82 N. W. 472; *District Township of Eureka v. Farmers' Bank*, 88 Iowa, 194, 55 N. W. 342; *Moore v. Cheseborough (Iowa)*, 81 N. W. 649; *Kansas State Bank v. First State Bank*, 9 Kan. App. 839, 61 Pac. 868; *Sunderlin v. Mecosta County Sav. Bank*, 116 Mich. 281, 74 N. W. 478; *Sherwood v. Milford Bank*, 94 Mich. 78, 53 N. W. 923; *In re Seven Corners' Bank*, 58 Minn. 5, 59 N. W. 633; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994; *Frank v. Bingham*, 58 Hun, 580, 12 N. Y. Supp. 767; *Freiberg v. Stoddard*, 161 Pa. St. 259, 28 Atl. 1111; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383 (overruling *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214); *Thuemmler v. Barth*, 89 Wis. 381, 62 N. W. 94; *Dowie v. Humphrey*, 91 Wis. 98, 64 N. W. 315; *City Bank of Hopkinsville v. Blackmore*, 73 Fed. 771, 21 C. C. A. 514; *Beard v. Independent District of Pella City*, 88 Fed. 375, 31 C. C. A. 562.

SMALL v. SMITH.

[14 S. Dak. 621, 86 N. W. 649.]

A FOREIGN RECEIVER MAY MAINTAIN AN ACTION to recover real property in the possession of a resident of the state, where the rights of domestic creditors are not involved. (pp. 808, 810.)

G. R. Krause, for the appellant.

R. W. Hobart and Robertson & Dougherty, for the respondent.

⁶²¹ CORSON, J. This is an appeal by the defendant from an order overruling a demurrer to the complaint. The demurrer was interposed upon the grounds: 1. That it appears upon the face of the complaint that the plaintiff has not legal capacity to sue; 2. That the complaint does not state facts sufficient to constitute a cause of action. As it is clear from an examination of the complaint that, if the plaintiff has legal capacity to sue, it states facts sufficient to constitute a cause of action, the only question to be considered is whether or not respondent, as receiver of a foreign corporation, has legal capacity to maintain an action to recover possession of real property from a resident of this state in the actual possession of the same. The complaint sets out very fully the proceedings of the supreme court of the state of Maine resulting in the appointment of the plaintiff ⁶²² herein as receiver of the American Banking and Trust Company, a corporation organized and existing under the laws of that state, and from which it appears that the respondent was duly appointed receiver of said corporation by a court of competent jurisdiction, and that respondent was authorized and directed by the order of said court to take possession of all the real and personal property owned by the said corporation. It is undoubtedly true that in many of the earlier cases, including the case of Booth v. Clark, 17 How. 322, decided by the supreme court of the United States, receivers were not generally permitted to sue in a foreign jurisdiction for the property of a debtor; but in the later cases, while the courts have held that a receiver has not the absolute right to sue in the courts of a foreign state outside of the jurisdiction of his appointment, yet he may, as matter of comity, maintain suits in foreign courts, where no detriment to

the creditors residing in such foreign jurisdiction will result. The author of the title "Receivers" in the American and English Encyclopedia of Law, in the text, says: "While it is clear that, as a matter of right, a receiver cannot demand recognition outside of the jurisdiction of his appointment, yet it is now generally held that he may, as a matter of comity, maintain suits in foreign courts. This comity will not be extended, however, to the detriment of creditors resident in such foreign jurisdiction. The authorities supporting this exception are so numerous, and the language of the courts so favorable to its extension, that it seems certain the exception will soon—if it has not already—supersede the general rule": 20 Am. & Eng. Ency. of Law, 242. In support of the text the author cites a large number of authorities. In *Hurd v. City of Elizabeth*, 41 N. J. L. 1, the supreme court of New Jersey reviews very fully the authorities upon this subject, and in speaking of *Booth v. Clark*, 17 How. 322, says: "But that case belongs to a train of ⁶²⁸ decisions which have undoubtedly been rightfully decided. . . . They are all cases involving a controversy between the receiver and the creditors of the person whose property has been placed under the control of such receiver. In such a posture of things, it is manifest that different considerations should have force from those that are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the officer of a foreign court should not be permitted, as against the claims of creditors here, to remove from this state the assets of the debtor, is a proposition that seems to be asserted by all the decisions; but that, similarly, he should not be permitted to remove such assets when creditors are not so interested, is quite a different affair. . . . There are certainly dicta that go even to that extent, so far that text-writers seem to have felt themselves warranted in declaring that the powers of an officer of this kind are strictly circumscribed by the jurisdictional limits of the tribunal from which he derives his existence, and that he will not be recognized as a suitor outside of such limits. But I think that the more correct definition of the legal rule would be that a receiver cannot sue, or otherwise exercise his functions, in a foreign jurisdiction, whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction. There seems to be no reason why this should not be the accepted principle. When

there are no persons interested but the litigants in a foreign jurisdiction, and it becomes expedient, in the progress of such suit, that the property of one of them, wherever it may be situated, should be brought in and subjected to such proceedings, I can think of no objection against allowing such a power to be exercised." In the late case of *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363, 40 Atl. 275, decided in 1898, this question was fully considered by the supreme court of Maryland; and it quotes with ⁶²⁴ approval the last clause of the text of 20 American and English Encyclopedia of Law, 242, heretofore referred to. It also quotes with approval the following from *Hurd v. City of Elizabeth*, 41 N. J. L. 1: "After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of a foreign tribunal should be acknowledged and aided": *Patterson v. Lynde*, 112 Ill. 196; *Bagby v. Railroad Co.*, 86 Pa. St. 291; *Metzner v. Bauer*, 98 Ind. 427; *Bank v. McLeod*, 38 Ohio St. 174; *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, 54 N. W. 395; *Boulware v. Davis*, 90 Ala. 207, 8 South. 84; *Chicago etc. Ry. Co. v. Keokuk Northern Line Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557; *Killmer v. Hobart*, 58 How. Pr. 452.

In the case at bar it will be noticed that the action is to recover the possession of a tract of land in this state claimed to be owned by the banking company for which the plaintiff was appointed receiver. No question of the right of creditors in this state, so far as the record discloses, is involved. Certainly, if the defendant is holding possession of the property wrongfully as against the receiver, it is not the policy of this state to protect him in such holding. If he is the owner or entitled to the possession of the property, we may reasonably assume that our courts will protect him in such right. It seems to us, therefore, that comity, as it exists between the states of this Union, requires that it be extended by this court to a case like that one at bar. We are of the opinion, therefore, that the demurrer to the complaint, interposed upon the ground that it was not competent for the receiver to sue in the courts of this state, was properly overruled, and the order of the circuit court overruling the same is affirmed.

FULLER, P. J., dissenting. At page 817 of 17 Encyclopedia of Pleading and Practice, the prevailing doctrine is concisely stated thus: "A receiver may ⁶²⁵ not generally sue

in his own name in a foreign state, even though authorized by statute or order of court where he was appointed, since such laws or orders relate to the remedy merely, and the law of the forum governs." After elucidating most instructively the nature and extent of a receiver's title and want of authority to maintain an action for the recovery of property situated in another state, Mr. Justice Wayne, speaking for the supreme court of the United States, says: "Our industry has been taxed unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of a debtor": *Booth v. Clark*, 17 How. 322. Obviously, the order by which respondent was appointed and authorized to gather the corporate property has no force beyond the jurisdiction of the court in which the action was tried, and, as a matter of legal right, such officer is entitled to no recognition by the courts of this state: *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691; *Brady v. Connelly*, 52 Mo. 19; *Filkins v. Nunne-macher*, 81 Wis. 91, 51 N. W. 79; *Hazard v. Durant*, 19 Fed. 471; *Catlin v. Silver-Plate Co.*, 123 Ind. 477, 18 Am. St. Rep. 388, 24 N. E. 250. As an exception to the general rule that a receiver has no extraterritorial power, some modern authorities, in recognition of the principles of judicial comity between states, warrant a receiver in bringing an action in a foreign jurisdiction when the rights of its own citizens are not injuriously affected thereby, or when the defendant was a party to the action creating the receivership, but such is not this case: *Boulware v. Davis*, 90 Ala. 207, 8 South. 84; *Weil v. Bank of Burr Oak*, 76 Mo. App. 34; *Willitts v. Waite*, 25 N. Y. 577; *McClure v. Campbell*, 71 Wis. 350, 5 Am. St. Rep. 220, 37 N. W. 343. Respondent being the coercive creature of a different forum, neither under the supervision of, nor accountable to, the courts of this state for the faithful discharge of his duty, ²²⁸ it is contrary to public policy and judicial practice to confer upon him all the rights of a resident suitor, to the prejudice of one of our citizens.

In my opinion, the generally accepted doctrine applicable to cases like this negatives respondent's right to maintain his action, and the judgment appealed from ought to be reversed, with the direction that the demurrer be sustained.

Suits by Foreign Receivers are discussed in the monographic notes to *Straughan v. Hallwood*, 8 Am. St. Rep. 49-54; *Alley v. Caspari*, 6 Am. St. Rep. 185-189. Consult, also, the recent cases of

Murtey v. Allen, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752; Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655. The right of a receiver to bring suits in a foreign jurisdiction cannot be conferred absolutely upon him by his order of appointment, but can arise only through an exercise of comity between states, and such exercise will be denied where it would be in contravention of the rights of citizens and opposed to equity: Wyman v. Eaton, 107 Iowa, 214, 70 Am. St. Rep. 193, 77 N. W. 865. See, too, Wilson v. Keels, 64 S. O. 545, 71 Am. St. Rep. 816, 32 S. E. 702; Castleman v. Templeman, 87 Md. 546, 67 Am. St. Rep. 863, 40 Atl. 275. A foreign receiver cannot assert title to property within the state as against the attachment of a resident creditor: Grogan v. Egbert, 44 W. Va. 76, 67 Am. St. Rep. 763, 28 S. E. 714.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

FIDELITY MUTUAL LIFE ASSOCIATION v. HARRIS.

[94 Tex. 25, 57 S. W. 635.]

INSURANCE, LIFE — WARRANTIES — The validity of a policy of life insurance must depend upon the statements made in the written application, regardless of any oral communications made by the applicant to the soliciting agent. (p. 817.)

CORPORATIONS.—BY WHAT LAW GOVERNED.—The rule that a corporation derives all of its powers from the law which creates it, and that its transactions, wherever they may occur, must be within the powers conferred by that law, relates only to the charter of the corporation, or to the law under which it is created and by which its powers are defined, and not to general legislation of the state upon other subjects. A corporation created by the laws of another state does not bring into every state where it transacts business the general laws of the state of its creation. (p. 817.)

CONFLICT OF LAWS—PLACE OF CONTRACT.—Contracts are governed by the law of the place where made, unless a different place is fixed thereby for their performance; and the place where made is the place where by acquiescence or final agreement of the minds of the parties the contract is concluded. (p. 818.)

CONFLICT OF LAWS—PLACE WHERE MADE.—CONTRACTS OF INSURANCE upon applications taken in one state by an agent without authority to conclude the contract or bind the company, and forwarded to the domicile of the company and there accepted and the policy issued, are ordinarily to be treated as having been made at such domicile and to be performed there. (p. 818.)

INSURANCE — CONFLICT OF LAWS — PLACE OF CONTRACT.—If the first payment of premium is forwarded with the application for insurance, a provision in the policy that it "shall not be binding until delivery during the lifetime and good health of the applicant, and until the first payment due thereon has been made," does not suspend the contract until delivered to the insured and make the place of delivery that of the contract, especially when the policy is forwarded to the agent for unconditional delivery. (pp. 818, 821.)

INSURANCE—CONTRACT, WHEN COMPLETE.—The acceptance of an application for insurance and the issuance and mailing of the policy are all of the acts that are essential to put the contract in force. The fact that the policy is then sent to an insurance agent for unconditional delivery does not alter the effect of the transaction, nor make the place of delivery the place where the contract is made. (p. 820.)

CONFLICT OF LAWS—PLACE OF CONTRACT.—Although a court of one state will not apply to contracts made in another state, the law of that state, when such application is forbidden by the law to which the court owes obedience, still, in the absence of anything forbidding it, the contract must be governed by the law of the place where made and to be performed. (p. 821.)

INSURANCE—CONFLICT OF LAWS—MATERIALITY OF REPRESENTATIONS.—If a contract of insurance is made in, and governed by, the laws of another state, wherein representations in an application for insurance as to previous medical attendance are material to the risk, as matter of law, such holding is conclusive as to the materiality of such representations in an action on the policy in another state. (pp. 822, 823.)

Perkins, Gilbert & Hall, and R. C. Milliken, for the appellants.

Morris & Crom and F. J. McCord, for the appellees.

³¹ WILLIAMS, A. J. Plaintiff brought this action to cancel a policy for five thousand dollars, issued upon the life of W. T. Harris, upon the ground that it was obtained through a fraudulent conspiracy between Harris and one Mattox, by means of false representations and warranties, and upon the further ground that it was a wagering contract. Plaintiff tendered back all premiums paid upon the policy. Harris died pending the suit, and Mattox, as executor of his will, defended the action, and, by cross-petition, sought to recover upon the policy. A judgment of the district court in favor of the defendant for the amount of the policy having been rendered, and, upon appeal, affirmed by the court of civil appeals, this writ of error is prosecuted from the judgment of that court.

Plaintiff in error is a corporation created under the laws of Pennsylvania, and has its domicile in Philadelphia, and conducts its business there. Harris resided in Texas. His application for insurance and the first premium were delivered in Texas to a traveling soliciting agent of the company, and were by him forwarded through the state agent to the company's office in Philadelphia, and were there accepted by it. The policy was then executed and forwarded to the state agent at Dallas and was delivered by him to the soliciting agent, and was by the latter transmitted to Harris. The policy did not,

in express terms, name the place for payment of future premiums, or of the loss in case it should occur. It recited, however, that the contract was made in consideration of the payment of the premiums "to the said association," and that payment of loss will be made after receipt of proofs of loss "at its office in the city of Philadelphia," and "upon presentation and surrender of the policy properly receipted." It further provided that premiums shall not be considered paid "unless receipt shall be given therefor signed by the president and treasurer and countersigned by the agent or person to whom payment is made," and ³² that the policy "shall not be binding until delivery during the lifetime and good health of the applicant and until the first payment due hereon has been made."

The application provided: "The policy issued hereon shall not become binding on the association until the first payment due thereon has been actually received by the association or by its authorized agent during my lifetime and good health."

By a statute of Pennsylvania, it was provided: "Section 1. Be it enacted, etc., that hereafter whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall affect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk."

The application and the policy contained provisions sufficient, in the absence of such a statute, to make the statements in the application warranties and to avoid the policy if any of such statements were untrue. The misrepresentations relied on by plaintiff to avoid the policy were the following: 1. That applicant, at the date of his application—February 4, 1893—was in good health and free from any and all diseases, sicknesses, ailments, and complaints, trivial and otherwise; 2. That he had never had or been afflicted with any sickness, disease, ailment, injury, or complaint, except as hereafter stated, the exception being that he had pneumonia about fifteen years before, lasting six or eight days, from which his recovery was perfect; 3. That the last physician whom he had consulted or who had prescribed for him was Dr. Sam Hart, about three years previously, for an attack of la grippe, which was trivial and of only a few days' duration; 4. That he had not consulted

nor been prescribed for by any other physician or medical man during the last ten years; 5. That he signed the application in his own proper handwriting.

The application also provided that no verbal statement, to whomsoever made, should modify the contract or in any manner affect the rights of the association, unless reduced to writing and presented to and approved by its officers at the home office, no agent or examiner having any authority to make or alter contracts or waive forfeitures, and that the application should be the sole basis of the contract. The policy issued and delivered to Harris had a copy of the application annexed to it on which, in large red letters, was this caution: "Review the declarations made by you as given in this copy of your application, and, if any error has been made, advise the president of the association."

The evidence as to the truth and materiality of some of these representations conflicted. The plaintiff adduced evidence sufficient to show that for several years prior to the date of the application Harris had been in bad health, suffering from affections of the throat or bronchial ³³ tubes or lungs, or all of them; that the attack of la grippe was a severe one and that Harris never recovered from it, but that, as a consequence of it, consumption developed and existed when the application was made, and finally caused his death in September, 1894. Harris, whose deposition was taken before his death, admitted that the attack of la grippe was a severe one, and the evidence is practically uncontradicted that its effects lasted for a considerable time, in 1890 and 1891, but, at the same time, his evidence and that of other witnesses for the defendant tended to show that his recovery was complete in the early part of 1891, and that his health was good from then until the date of the application, and for some time after, and that the disease of which he died originated in the summer of 1893 from causes unconnected with any previous infirmity. Dr. Sam Hart was the physician who first treated him for this illness in 1890. But subsequently, during that year and 1891, Dr. V. T. Hart, Dr. Cochrane, Dr. Dobbins, and Dr. Goldsmith also treated and prescribed for him. Plaintiff also introduced the testimony of two other physicians who testified that they had been consulted by and prescribed for him; but as to this it may be conceded that there was a conflict of evidence. Harris also testified that Dr. V. T. Hart and Dr. Cochrane merely filled the place of his regular attendant, Dr. Sam Hart, during his absence. And

it may be also conceded that if they had been the only physicians who were not mentioned by him, his answer would have been substantially true and not material to the risk. It is, nevertheless, a conceded fact that both Dr. Dobbins and Dr. Goldsmith were consulted with and prescribed for him during the early part of 1891 while he was still suffering from la grippe or its effects. Dr. Goldsmith testified that he found Harris suffering from catarrhal bronchitis, such as is generally considered la grippe, and treated him once and prescribed for him afterward; did not consider his sickness serious and treated him no further.

Dr. Dobbins testified that he treated Harris from about February 1 until April 1, 1891; found him confined to his bed, emaciated and coughing freely, and he was not a sound man physically; thought he either had consumption in its incipency or would have it as the sequel of la grippe. When he last saw him, about the 1st of April, he had improved some, but was not a sound man. The witness further stated that he gave the treatment gratuitously at the solicitation of the Masonic order, of which he and Harris were members, but his evidence shows and Harris admits that his services were accepted.

It appears that the agent who took the application for insurance wrote the answers and did not read them to Harris after they were reduced to writing. There is evidence that, as given by Harris, the answers were true, except those as to his last physician and those whom he had consulted within ten years. He did not mention other physicians, but said to the agent that he had sometimes obtained medicines from drug stores, and perhaps had a physician for colds ²⁴ or malarial attacks of the common kind, and this statement the agent did not consider material and did not insert in the application. The company, in issuing the policy, acted solely upon the written application, with no knowledge of any verbal statements made by Harris to the agent.

The view taken of the case renders it unnecessary to state the facts upon which the claim that the policy was a wagering one is based.

The trial court held, correctly, we think, that the validity of the policy must depend upon the statements in the written application, regardless of any oral communications made by Harris to the soliciting agent. Upon this point we need only refer to the following authorities: *Fitzmaurice v. Mutual Life*

Ins. Co., 84 Tex. 61, 19 S. W. 301; New York Life Ins. Co. v. Fletcher, 117 U. S. 530, 6 Sup. Ct. Rep. 837.

The plaintiff in error contends that the contract was made in Texas, and that its effect should be determined by the laws of this state, and that, as the representations were made warranties by the policy, and some of them at least were untrue, the policy is avoided without regard to their materiality. Defendant in error contends that the Pennsylvania statute governs the case because: 1. It restricts the capacity to contract of a corporation which derives its existence and all its powers from the laws of that state, which laws follow and control it wherever it goes; 2. The contract was made and to be performed in that state. The statute seems to be simply a part of the body of the laws of Pennsylvania regulating contracts of insurance, and not one specially defining and limiting the powers of this corporation or of corporations generally. The rule is recognized that a corporation derives all its powers from the law which creates it, and that its transactions, wherever they may occur, must be within the powers conferred by that law. This rule is generally held, however, to relate only to the charter of the corporation, or to the law under which it is created and by which its powers are defined, and not to general legislation of the state upon other subjects: 2 Morawetz on Corporations, secs. 967, 968, and cases cited. This contention of defendant in error finds direct sanction, however, in the case of Fidelity Mut. Ins. Co. v. Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197, a case involving this company and the application of the same statute. The necessities of this case do not require a discussion of the principle referred to, and we content ourselves with repeating what we said in the Seiders case: "We are not inclined to hold that a corporation created by the laws of another state brings with it into this state the general statute laws of the state of its creation": Seiders v. Merchants' Life Ins. Co., 93 Tex. 198, 54 S. W. 754.

It is true, however, that the effect of a contract, wherever it may come in question, is to be determined by the law with reference to which the parties contracted, though it be that of another state or country, unless there is something in the law or policy of the forum which forbids the application of the foreign law. The considerations ³⁵ upon which the law applicable to the contract is to be ascertained are fully discussed and comprehensively stated in the opinion of Justice Matthews in Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. Rep. 102.

The leading principle is that the law is to govern to which "it is just to presume they [the parties] have intrusted themselves." Unless a contrary intent is to be deduced from the transaction, the presumption is that the parties contracted with reference to the law of the place where the contract was made; but if they have fixed a different place for the performance of it, the law of that place is to govern unless something else appears showing that they had a different intention: *Seiders v. Merchants' Life Ins. Co.*, 93 Tex. 194, 54 S. W. 754; *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. Rep. 154; *Coghlan v. South Carolina R. R. Co.*, 142 U. S. 101, 12 Sup. Ct. Rep. 150. The place of performance is to be regarded as the same as that at which the contract is made, unless it is to be gathered from the agreement that a different one was fixed. When the contract is made through correspondence, one of the parties being in one state and the other in a different state, it sometimes becomes difficult to determine in which state the contract has been made. The test is generally held to be the acquiescence or final agreement of minds by which the contract is concluded, and the place where that occurs is the place where the contract, for most purposes, is held to have been made. With reference to contracts of insurance, where applications or proposals are taken in one state by an agent having no authority to conclude the contract or bind the company, and are forwarded to the domicile of the company and there accepted and the policy issued, the contract is ordinarily to be treated as having been made at such domicile and to be performed there: *Wharton on Conflict of Laws*, sec. 465; *Bliss on Life Insurance*, sec. 362; *May on Insurance*, sec. 66, and cases cited. This is true, however, only because the act of the company in signifying its acceptance of the proposal completes the contract, and when, as sometimes happens, other things are to be done before the parties are to be bound, the contract is held to have been made when and where such other things transpire. It is often stipulated in policies that they are not to take effect until the first premium has been paid and the policy has been countersigned by the agent of the company in the place where the applicant resides, and it is held that the contract is to be considered as made where these acts are done.

The policy under consideration required no counter-signature, but the application stipulated that the policy was not to be binding until the first premium had been paid during the lifetime and good health of applicant. Since the premium ac-

accompanied the application and was accepted and retained by the company, the issuance of the policy, without other condition than this, would obviously have fixed the time and place when the contract took effect, if it ever took effect at all. If the applicant had then been dead or not in good health, the policy would never have been binding; but as he was alive, it became effectual at once, if he was also in good health, unless other provisions postponed ³⁸ its conclusion, since by this clause of the application no provision was made for the subsequent ascertainment of the facts as to good or bad payment, or for the happening of any other event essential to the completion of the contract. The chief difficulty in this branch of the case arises from the provision of the policy that it "shall not be binding until delivery during the lifetime and good health of the applicant, and until the first payment due hereon has been made." If the effect of this provision was to keep the contract in suspense until the policy was actually received by Harris, so that it was not to be in force until that event, many authorities would justify the proposition that, as it thus became effective in Texas, the laws of this state would apply. Looking to the whole provision, however, as well as to that contained in the application, we are inclined to view this condition as one generally used in blank policies to cover cases where the first premium has not been paid when the policy issues, but is to be paid subsequently, and to make the obligation of the company begin when payment is made and subject to the condition of the applicant existing at that time rather than at the date of the policy, and not as one intended to postpone the taking effect of the policy when the premium has already been received and all the terms of the contract agreed upon.

The character of the risk to be assumed in this case was passed upon in accepting the application, and, as the premium had then been paid and accepted, there was nothing to prevent the immediate conclusion of the contract subject to the other condition, that the applicant should be at the date of the policy alive and in good health: Story on Conflict of Laws, sec. 279a; Schwartz v. Germania Ins. Co., 18 Minn. 448. The general rule is that the acceptance of the application and the issuance and mailing of the policy are all the acts that are essential to put the contract in force, and the fact that the policy is sent to an agent for unconditional delivery does not alter the effect of the transaction: Shattuck v. Mutual Life Ins. Co., 4 Cliff. 598, Fed. Cas. No. 12,715. It does not appear that the

agent to whom this policy was sent was to ascertain the condition of Harris' health, or that he had any discretion to hold it in any event, and this distinguishes the case from that of *Equitable Life Assur. Soc. v. Pettus*, 140 U. S. 226, 11 Sup. Ct. Rep. 822, in which the premium was to be collected by the local agent before the policy took effect. That case and others relied on by plaintiff in error are further distinguishable from this upon another ground which will be stated further on.

In *Schwartz v. Germania Ins. Co.*, 18 Minn. 448, the policy containing the same provision as that under consideration was sent by the company to its agent in Minnesota for delivery upon payment of first premium while applicant was alive and in good health, and the agent refused to deliver it because the applicant was sick. It was held that if the agent was authorized by instruction to withhold the policy because of such sickness, the contract did not take effect; but that ³⁰ if it was sent for delivery upon payment of premium with no authority in the agent to retain it because of applicant's condition, the contract became effective upon tender of premium. It necessarily follows that if the premium has been paid when the policy issues, such a provision as this does not hinder its immediate operation.

Since the premium had been paid and all the terms of the contract settled at the home office of the company, we do not think that the clause in question was intended to hold the contract in abeyance until the policy should be actually received by Harris. This view of it is confirmed by the evident implication from the whole transaction that the parties contemplated performance in Pennsylvania. The premiums were to be paid to the company or its agents. There is no stipulation that agents authorized to receive premiums should be kept in Texas. In case none were provided, the premiums must of necessity have been paid at the office of the company. And so as to payment of loss. All the documents essential to entitle the beneficiary to payment were to be presented at Philadelphia, and the intention that the money should be payable there is manifest.

The authorities relied on by plaintiff in error to show that this is a Texas contract are mainly based, as it seems to us, upon a principle not applicable to this case. As before noted, a court of one state will not apply to contracts brought before it the laws of another state, when such application is forbidden by the law to which the court owes obedience. In the cases

referred to, the transactions were so conducted as to be controlled by statutes in force in the states where the courts passing upon them sat. In the federal cases, this more clearly appears in the reports of the decisions of the circuit courts than in those of the supreme court: *Equitable Life Assur. Soc. v. Pettus*, 140 U. S. 226, 11 Sup. Ct. Rep. 822; *Wall v. Equitable Life Assur. Soc.*, 32 Fed. 273; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, 13 Fed. 526; *Knights Templar etc. Co. v. Berry*, 50 Fed. 512; *Mutual Ben. Life Ins. Co. v. Robison*, 54 Fed. 580; *Hicks v. National Life Ins. Co.*, 60 Fed. 692; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 523. It cannot be said that the authorities upon this subject are harmonious, but we think those cited are to be understood as just indicated. There is no statute in Texas which prevents the court from applying the general rules of comity stated at the outset. We therefore hold that the law of Pennsylvania should be followed in determining the validity and construction of this contract; and this embraces the statute and its construction by the courts of that state as well as any other rule shown to be law there in force and applicable, whether fixed by statute or not.

The assignments of error complain of the charge of the court for submitting to the jury the question of the materiality of the representations the falsity of which is relied on to defeat the policy, the contention being that under the law of Pennsylvania, as shown by decisions of the supreme court of that state, the question of materiality was one of law, and that the court should have instructed that ³⁸ those in question are material and avoided the policy. The first questions for the jury to determine were, what ones of the representations were untrue, and the extent to which they were untrue. When this was determined, the question remained, whether or not the untrue portions were material. Unless they were so clearly material that reasonable minds could not differ about it, we think it was proper to submit the question of materiality to the jury. The evidence was such concerning the statements about the past and present health of the applicant and the fact that he signed the application in his own writing, that the court was warranted in leaving to the jury the question whether or not any untruth or inaccuracy they might find to exist in such statements was material to the risk. Not so with regard to the representations concerning previous medical attendance. They were admittedly untrue and were, we think, necessarily and

plainly material. Such is the law of Pennsylvania as shown by the decisions referred to. In *March v. Metropolitan Ins. Co.*, 186 Pa. St. 629, 65 Am. St. Rep. 887, 40 Atl. 1100, the supreme court of that state thus states the law: "Ordinarily, questions of good faith and materiality are for the jury, and where the materiality of a statement to the risk involved is itself of a doubtful character, its determination should be submitted to the jury. But it was never intended by the act of 1885, nor did that act assume, to change the law in cases where the matter stated was palpably and manifestly material to the risk, or where it was absolutely and visibly false in fact." And further on says: "The act of 1885 has nothing to do with this question. If these were material questions before that act was passed, they are material still, and must be so pronounced by the court, without reference to the jury. A strong case illustrating the materiality of this class of questions is *United Brethren Mut. Aid Soc. v. O'Hara*, 120 Pa. St. 256, 13 Atl. 932. In the opinion delivered by Paxson, J., it is said: "The eighth interrogatory in the application is: "Have you had any medical attendance within the last year prior to this date? If so, for what disease? Give name and address of the doctor in full." The object of this inquiry is manifest. If the assured had no medical attendance within the time prescribed, and so answers, that is the end of it. But if he had such attendance, then the company is entitled to know for what cause he had medical advice or aid, and the name and address of the doctor, in order that they may ascertain the particulars from him. And, if the assured falsely answer that he had no medical attendance, he is not entitled to recover.'" And further: "In *Wall v. Royal Soc.*, 179 Pa. St. 355, 36 Atl. 748, the questions and answers related to the health of the insured, and the attendance of a physician. The judgment was reversed on the ground, substantially, that it was competent to the defendant company to prove the falsity of the answers, without regard to the question whether they were warranties, or only misrepresentations."

In *Lutz v. Metropolitan Life Ins. Co.*, 186 Pa. St. 527, 40 Atl. 1104, it ⁸⁹ appeared that in the application false answers were made to several questions, one of which was, "Have you ever consulted any other physician? A. No." And the same court said: "Where it was doubtful whether the matter was material, the question of materiality must be submitted to the jury, but where the matter involved was palpably and mani-

festly material to the risk, the law was not changed, either by the act of 1885, or by any decision before or since. Thus, in the present case, all the questions above enumerated were intrinsically and essentially material to the risk, and have always been so held by all courts of last resort."

It thus appears that by the law of Pennsylvania statements such as those made in Harris' application concerning previous medical attendance are material to the risk, and, when untrue, avoid the policy. This is a rule of substantive law and not merely one of procedure. How it is to be made effectual in the trial of a case, whether by peremptory instruction or by a declaration in the charge that the matter is material, or by setting aside a verdict rendered in disregard of it, is a question of procedure, and we agree with the court of civil appeals that the practice in Pennsylvania, as shown by these decisions, is not materially different from our own. In both states, when the evidence is clear and uncontroverted, it is error to submit the question to the jury and error to allow a verdict thus against the law and evidence to stand. That the representations under discussion were material is sufficiently shown by the quotations from the decisions: See, also, *Bliss on Life Insurance*; *Cobb v. Covenant Mut. Ben. Assn.*, 153 Mass. 192, 25 Am. St. Rep. 619, 26 N. E. 230; *Numrich v. Supreme Lodge etc.*, 3 N. Y. Supp. 553. It may be true that an error in statement in an application concerning medical attention might, in some cases, appear to be immaterial, but this cannot be held as to those in this case.

Applying to the contract the law most favorable to defendant in error, we must hold the policy was avoided by representations which were both false and material. And, as the facts are undisputed, there is no reason for remanding the case. The judgments of the court of civil appeals and the district court are reversed, and judgment will be here rendered for plaintiff in error.

Conflict of Laws.—The law of the place where a contract is to be performed is the law of the contract: *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854. When a personal contract is to be partly performed in the state where made and partly in another state, the law of the former prevails, unless there is manifested a clear intention to the contrary: *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703. As a general rule, however, a contract is governed by the law of the place where made: *Southern Ry. Co. v. Harrison*, 119 Ala. 539, 72 Am. St. Rep. 936, 24 South. 552. See the monographic note, on this subject, to *McGarry v. Nicklin*, 54 Am. St. Rep. 44-55.

Insurance—Conflict of Laws.—A contract of insurance is generally deemed to be a contract of the place where the last act was done necessary to its becoming binding. If an application for insurance is forwarded to the insurer to its place of business in another state for approval or acceptance, the contract is made at the place where such acceptance and the issuance of the policy are made: See the monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 51; *State etc. Ins. Assn. v. Brinkley Stove etc. Co.*, 61 Ark. 1, 54 Am. St. Rep. 191, 31 S. W. 157. Compare *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731; *Daggs v. Orient Ins. Co.*, 136 Mo. 362, 58 Am. St. Rep. 638, 38 S. W. 85; *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717, 29 S. E. 944. As to conflict of laws respecting the effect of representations in an application for insurance, see *Supreme Council etc. v. Brashears*, 89 Md. 624, 78 Am. St. Rep. 244, 43 Atl. 866.

When an Insurance Policy Takes Effect is the subject of the monographic note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 143-153. The deposit of a policy in the mails, addressed to the insured, is a delivery to him: *Triple Link etc. Assn. v. Williams*, 121 Ala. 138, 77 Am. St. Rep. 34, 28 South. 19. But see *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 83 Am. St. Rep. 851, 85 N. W. 128.

CITY OF SHERMAN v. SHOBE.

[94 Tex. 126, 58 S. W. 949.]

GARNISHMENT.—COUNTIES ARE NOT SUBJECT TO GARNISHMENT. (p. 827.)

GARNISHMENT.—A COUNTY CANNOT WAIVE ITS EXEMPTION from garnishment. If such waiver is made, it must be by the defendant in the garnishment proceedings whose interest and right are involved. (p. 828.)

GARNISHMENT.—COUNTIES.—EXEMPTION from general creditors of money raised by taxation to pay current expenses of a city protects from garnishment indebtedness of a county to such city for expense paid by it in maintaining a quarantine made necessary by an epidemic. (p. 828.)

GARNISHMENT.—COUNTIES.—Surplus of general revenues of a county remaining after its current expenses have been paid is subject to the claim of a general creditor, but garnishment against the county is not the remedy to subject the fund to the payment of his debt. (p. 828.)

G. P. Webb, city attorney, B. L. Jones, W. J. Brown, city attorney, and S. Wilson, for the appellant.

J. H. Wood, for the appellee.

¹²⁹ **GAINES, C. J.** The defendant in error, having a judgment in the district court of Grayson county against the city of Sherman, the plaintiff in error, caused a writ of garnishment to issue against the county for the purpose of subjecting an

indebtedness claimed to be due from it to the city to the payment of her judgment. Briefly stated, the answer filed by the county judge on behalf of the county disclosed the following facts: An epidemic of smallpox having broken out in the city, a verbal agreement was entered into between the city authorities and those of the county to the effect that the city should take charge of all the cases in the city and should adopt all proper quarantine measures necessary to prevent the spread of the disease, and that the county should reimburse it for one-half of the expense to be incurred. The city carried out the agreement on its part and the commissioners' court passed an order authorizing the county judge to determine the amount justly due the city, not exceeding one-half of its expenditures in the matter, and to draw a warrant in favor of the city for the amount. The amount of the expense was ascertained and the county judge determined that one-half thereof—namely, eleven hundred and thirteen dollars and ninety-nine cents—was due under the contract. The city was made a party to the suit. The trial court, having heard the case, gave judgment for the plaintiff in the writ and the city appealed. The judgment was affirmed by the court of civil appeals.

We are of opinion that this was error.

Upon the question whether or not a county, in the absence of express mention in the statute authorizing the writ of garnishment, is subject to be garnished, there is a conflict of authority. The weight of authority, however, holds that it is not: *Boone County v. Keck*, 31 Ark. 387; *Mayor etc. of Mobile v. Rowland*, 26 Ala. 498; *Merrell v. Campbell*, 49 Wis. 535, 35 Am. Rep. 785, 5 N. W. 912; *Dotterer v. Bowe*, 84 Ga. 769, 11 S. E. 896; *State v. Eberly*, 12 Neb. 616, 12 N. W. 96. In the Georgia case above cited the court say: "So we think that, as no express authority is granted by statute to authorize this process against counties, public policy forbids us to hold that such a grant exists by implication." The cases cited proceed mainly upon the same ground—namely, that it is contrary to public policy to subject a county to the writ. Counties are commonly designated quasi corporations for the reason that, being but political subdivisions of the state and organized purely for the purposes of government, they differ essentially not only from private corporations but also from such public corporations as towns and cities, which are voluntary and are established largely for the private interests of

their inhabitants: *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517. Our statutes, it is true, expressly declare that "each county . . . shall be a body corporate and politic." This merely confers ¹³⁰ upon the counties corporate powers for the more effectual performance of the functions for which they were created, and clearly was not intended to place them upon the footing of private corporations or of other municipalities. A county may be sued for a money demand, but the claim must first be presented to the commissioners' court for allowance and its allowance must be refused: Rev. Stats., art. 790. Judgment may be rendered against it, but no execution can issue upon that judgment: Rev. Stats., art. 792. If a garnishment be considered a suit, then the application of the statutory regulations with reference to such writs to a county is inconsistent with the requirement that the claim must first be presented for allowance before suit, for the reason that no provision is made in those regulations for such presentation before suing out the writ. If the writ be treated as ancillary to another suit and as executive of a judgment obtained or to be obtained in such other suit (and such it has been considered by this court), then the application of the writ to the county would be not in accord with the spirit of that provision which prohibits the issue of executions against the counties.

Besides, our statutes require the garnishee should answer not only as to his indebtedness to the defendant in the original suit or judgment, but also whether he has any of the effects of such defendant in his possession, or what other persons, if any, are so indebted or have such effects: Rev. Stats., art. 233. If he fail to make full answer, it is also provided that judgment may be rendered against him. Now, supposing a writ of garnishment to issue against a county; presumably the county judge is the proper officer upon whom to serve the writ, and it seems to us absurd to require him to swear that the county knows of no other person who is indebted to or has effects of the defendant in its possession, and more unreasonable to render a judgment against the county upon his failure to make such oath. The writ of garnishment is but the creature of the statute, and it does seem to us that if the legislature had contemplated that the writ in any case should go against the county, they would have made some special provision with reference to the answer more appropriate to the particular proceeding.

It is held in *Herring-Hall-Marvin Co. v. Bexar County*, 16 Tex. Civ. App. 673, 40 S. W. 145, by the court of civil appeals for the fourth district, upon sound reasoning, as we think, that a county is not subject to be garnished. That decision was approved by this court, and a writ of error was refused. In the case of the city of *Laredo v. Nalle*, 65 Tex. 361, it was held that a city was subject to the writ. While the correctness of that ruling may be doubted, it is not necessary for us in this case to disturb it. The difference in their relation to the state government is pointed out in *Posnainsky v. Galveston*, 62 Tex. 118, 50 Am. Rep. 517, above cited, and has been held sufficient to justify the holding that a city is liable for damages for the negligence of its officers and agents in a case where a county would not be: *Heigel v. Wichita County*, 84 Tex. 392, 31 Am. St. Rep. 63, 19 S. W. 562.

Our conclusion is that the county was not subject to be garnished in this case.

¹²¹ But it is urged that the county, if not subject to the writ, has expressly waived its exemption. But it occurs to us that where one owes a debt and is ready to pay it, he has no legal interest in the question whether it shall be paid his creditor or to a plaintiff in a garnishment proceeding. It is the defendant whose interest and right is involved, and if any irregularity is to be waived, the waiver must come from him. The claim that a county could waive the want of a law to subject it to the process of garnishment, when brought to its last analysis, amounts to the assertion that a debtor may elect to pay his debt to the creditor of his creditor, rather than to the creditor himself. On the contrary, the rule is that the garnishee cannot, as against the defendant in the judgment or in the original proceeding, even accept or waive service of the writ: *Freeman v. Miller*, 51 Tex. 443; *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

But we think the judgment in this case ought to be reversed for still another reason. The money paid by the city in maintaining the quarantine made necessary by the epidemic of smallpox was presumably money raised by taxation for the payment of the current expenses of the city government. The debt of the county to the city is clearly a debt of that fund, and, in our opinion, is subject to the same exemption as that fund. It is a clearer case than that of *City of Sherman v. Williams*, 84 Tex. 421, 31 Am. St. Rep. 66, 19 S. W. 606, where the same principle was applied. It is only

upon the surplus of the general revenues of a county that remain after the current expenses have been paid that a general creditor has a claim, and to subject that surplus to the payment of his debt, the writ of garnishment is not the remedy. And we apprehend the same reason exists for refusing to subject this fund now in the hands of the county of Grayson as would exist against impounding the tax money in the hands of the city's treasurer.

The judgment of the district court and that of the court of civil appeals are reversed, and judgment is here rendered dismissing the writ of garnishment.

Garnishment.—Counties are generally held not subject to garnishment: *State v. Tyler*, 14 Wash. 495, 53 Am. St. Rep. 878, 45 Pac. 31; monographic notes to *Leake v. Lacey*, 51 Am. St. Rep. 119; *Divine v. Harvie*, 18 Am. Dec. 203. And so are cities: *Geist v. St. Louis*, 156 Mo. 643, 79 Am. St. Rep. 545, 57 S. W. 766; *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, 61 Am. St. Rep. 395, 68 N. W. 606; *Porter etc. Co. v. Perdue*, 105 Ala. 293, 53 Am. St. Rep. 124, 16 South. 713; *Skewes v. Tennessee Coal etc. Co.*, 124 Ala. 629, 82 Am. St. Rep. 214, 27 South. 435. However, these rules are not without exception: See *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 75 Am. St. Rep. 778, 33 S. E. 516; note to *Leake v. Lacey*, 51 Am. St. Rep. 117-120. As to whether a municipal corporation can waive its right to claim exemption from garnishment, the authorities are divided: See the monographic note to *Leake v. Lacey*, 51 Am. St. Rep. 117.

O'BRIEN v. WOELTZ.

[94 Tex. 148, 58 S. W. 943, 59 S. W. 535.]

HOMESTEADS — ABANDONMENT OF PART — MORTGAGE.—Husband and wife may abandon part of their homestead as such by devoting it to a use inconsistent with their homestead rights. The act of setting part of the land apart as a business house and executing a mortgage thereon to build such house is an abandonment of it for residence homestead purposes. (p. 832.)

HOMESTEADS—ABANDONMENT OF PART AND MORTGAGE THEREOF.—If husband and wife give a mortgage on a piece of property, with intention to abandon it as part of their residence homestead, and to secure money to build a business house thereon, the mortgage is not void by reason of its execution being one of the acts by which the property mortgaged is segregated from the homestead. (pp. 832, 833.)

HOMESTEADS — HOW ACQUIRED.—Intention cannot secure a homestead right without some act accompanying that intention which attaches to the property; and, while occupying a piece of property as his homestead, a man cannot, by intention to

use it in the future, establish a homestead right in another place. (p. 833.)

MORTGAGES—HOMESTEADS.—If a mortgage is void, because given on a homestead, it is not validated by a subsequent abandonment of the property as a homestead. (p. 833.)

G. C. Altgelt, for the appellant.

C. H. McGinnis and J. A. Buckler, for the appellee.

¹⁵¹ **BROWN, A. J.** Ida Woeltz sued her husband, August Woeltz, for a divorce and for a partition of the community property, making John O'Brien a defendant, alleging that he had a mortgage upon the greater part of the property, and that the mortgage was executed when the property hereafter mentioned was a part of the homestead of Woeltz and his wife. Mrs. Woeltz prayed that the mortgage be canceled and that the property constituting the homestead, as well as other property, be partitioned between herself and her husband. There were a number of lots involved in the suit, but the controversy is narrowed down to the south half of lot 14 in block 30, and lot No. 2 in block 4, in the city of San Antonio. We shall therefore only state the facts which are necessary to determine the rights of the parties as to these lots.

In 1893, August Woeltz, with his wife and children, resided upon the north half of lot No. 14 in block 30, and carried on a saloon and grocery business in a house on lot No. 2 in block 4. He owned both pieces of property at the time. The residence of the family was upon the north half of lot No. 14. Through the middle of that lot there was a fence built about six feet high, and on the south side of the fence a stable or stalls for horses was constructed, making the fence a part of it. The horses used in the business of Woeltz and for his family were fed and kept in this stable and the lot was used for the horses when they were turned loose, and sometimes persons who came to trade with Woeltz in his grocery and saloon business camped in the inclosure. On August 16, 1893, August Woeltz and his wife, Ida Woeltz, to secure the payment of a six thousand dollar note to John O'Brien, executed a deed of trust upon the south half of lot 14 and upon lot 2 in block 4, as well as upon other property. Woeltz borrowed six thousand dollars from O'Brien and expended the money in building a two-story brick house upon the south half of lot 14. As soon as the house was completed, Woeltz moved his business out of the house on lot 2 in block 4 into the new

storehouse, and has continued there since, renting out the house in which he formerly carried on business. Prior to the time that Woeltz negotiated with O'Brien for the money, he and his wife determined to build a ¹⁵² house upon the south part of lot 14 and had a cellar for the foundation of the house dug out at that place. Mrs. Woeltz testified as follows: "When we borrowed this money from Mr. O'Brien, I was satisfied that this property should be taken off from the homestead and mortgaged; Mr. Woeltz did this with my consent; and the north half of the lot with the house on it was reserved as our homestead. I did not want the homestead mortgaged. It has sufficient room for our family; has six rooms and there is ground enough, but there is not much backyard; not very much, but enough for comfortable use, and I was satisfied to have the homestead contracted that way. It left us a residence with sufficient ground around it; at least yard enough to get along with." Also as follows: "I understand the mortgage. I understood when we were mortgaging the property that we were reserving only the house we were living in." Woeltz testified: "I gave Mr. O'Brien a deed of trust for all of my property except the north half of lot 14, block 30. That was left out as our homestead. It was our family residence. This half of the lot was fenced off when the money was taken because he said it had to be fenced up. . . . At the time I borrowed the money, I had nothing where the store now is. A cellar was dug before I borrowed the money."

The plaintiff in error claimed that at the time the deed of trust was executed the south half of lot 14 was not a part of the residence homestead, and that subsequently to the execution of the deed the business homestead upon lot No. 2 in block 4 had been abandoned, making both pieces of property liable to the deed of trust. The case was submitted to the judge without a jury and he gave judgment canceling the deed of trust as to lot No. 2 in block 4, and foreclosing it upon so much of the south half of lot 14 as is covered by the building. The court of civil appeals reversed the judgment and rendered judgment canceling the deed of trust as to lot No. 2 in block 4, and also as to the south half of lot No. 14.

The case is presented to this court upon an assignment that the court of civil appeals erred in canceling the deed of trust upon the south half of lot No. 14 in block 30.

It is not claimed that the husband attempted in any way to defraud the wife of her homestead right, or that the deed of trust was made with a view of encumbering the homestead while it existed as such. Neither is it claimed that the homestead of the family was unduly contracted so as to render it inadequate; therefore the decisions of this court which involve those questions are wholly inapplicable to this case.

If Woeltz and wife had removed from lot 14 with the fixed intention to not return to it, the fact being clearly proved by their declarations or otherwise, this would constitute an abandonment of the homestead right: *Woolfolk v. Rickets*, 41 Tex. 362; *Cline v. Upton*, 56 Tex. 323. Why could they not, by the same acts, abandon a part of the lot? ¹⁵³ The act setting the land apart for a business house was an abandonment of it for residence purposes: *Medlenka v. Downing*, 59 Tex. 39.

In the case of *Wynne v. Hudson*, 66 Tex. 9, 17 S. W. 110, this court definitely held that the husband, without the consent and concurrence of the wife, might abandon a part of the homestead property as such and devote it to a use inconsistent with the residence homestead rights, and that by so doing the property would lose its character as homestead and its protection under the constitution. In that case the wife was not consulted about the transaction, and the husband did not intend by his acts to abandon the property as a homestead or to give up the exemption which the constitution secured to him, but had in view the use of it for purposes which were held by the court to be inconsistent with its use as a residence homestead, and therefore his acts, against his own will and consent and without the concurrence of his wife, worked a forfeiture of the homestead exemption to that portion of the property.

If the husband, without the consent of the wife, can cut off a part of the homestead occupied by the family and strip it of the constitutional exemption, then certainly the husband and wife, concurring in intention and acts, may accomplish the same thing. There is no question made in this case that Woeltz and his wife agreed that they would limit their residence homestead to the north half of lot 14 in block 30, in San Antonio, and that they would devote the south half of the said lot to occupancy by a business house to be constructed upon it. The intent to do this is testified to by both Woeltz and his wife, and they each testified that, in order to carry

out this intent, there was dug upon the southeast corner of the south half of that lot a cellar, constituting the foundation for the house to be built, and so far their acts were consistent with their intent to separate that part of the property from the homestead. In furtherance of this purpose they contracted with John O'Brien to borrow from him the money with which to erect the business house upon the property, and entered into an agreement that the money should be expended in the erection of that house, and to secure that end the money was deposited in the bank in San Antonio, to be paid out to the contractor. The execution of the deed which conveyed the land to J. A. Daugherty in trust had the effect to separate that part of the lot from the residence homestead and to devote it to use for a business house, consummating the purpose of Woeltz and wife.

In *West End Town Co. v. Grigg*, 93 Tex. 457, 56 S. W. 49, it was held that the making of a contract for improving a lot to be thereafter the homestead of the parties designated that lot as their homestead from the date of the contract; but the instrument by which the designation was effected was not void because the homestead right attached concurrently with the making of that instrument. The same principle is involved in this case. The making of the deed of trust in pursuance of the intent and in conformity with the previous actions of the ¹⁵⁴ parties was the final act by which that portion of the lot was separated from the homestead residence and devoted to use as a place of business, but the deed of trust is not void because it constituted one of the acts by which the property was set apart for the new use.

It is claimed that Woeltz intended to use the house when constructed as a place for his business, and that the intended use of it extended the homestead protection from the time it was segregated from the residence homestead to the time of its occupancy. If this be true, then Woeltz, by his actual occupancy of lot No. 2 in block 4, secured to himself a business homestead and exemption there, and, by intention, secured the exemption of the business homestead which he was thereafter to occupy on the south half of lot No. 14. Intention cannot secure a homestead right without some act accompanying that intention which attaches to the property. While occupying a piece of property as his homestead, a man cannot, by intention to use it in future, establish a homestead right in another place. From the time the property ceased

to be a part of the residence homestead to the time of its actual occupancy by Woeltz as a place of business, it was without the protection of the constitution. The deed of trust upon the south half of lot 14 in block 30 was valid, and the district court properly foreclosed the lien.

Lot No. 2 in block 4 being the business homestead of Woeltz at the time the deed of trust was made, it was void as to that lot, and it did not become effective after the abandonment of that lot as a place of business.

The court of civil appeals erred in reversing the judgment of the district court and in rendering judgment canceling the deed of trust as to the south half of lot 14, block 30. It is therefore ordered that the judgment of the court of civil appeals be reversed and that the judgment of the district court be affirmed.

The Abandonment of Homesteads is discussed in the monographic note to *Taylor v. Hargous*, 60 Am. Dec. 607-615. Temporary absence does not amount to an abandonment: *Minnesota Stoneware Co. v. Mc Crossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019. But the owner of land, who removes therefrom and procures a loan thereon by declaring that it is not his homestead, thereby abandons it as such: *Farmers' Bldg. etc. Assn. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062. The benefit of a homestead exemption is not lost by the owner's neglecting to use a portion of his dwelling-house or residence with his family, or by appropriating some portion to some other use: *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244. Though it is held that the term "house" includes only so much of a building as is used as a home, and not stores, shops, or rooms in the same building not so used: *Rhodes v. McCormick*, 4 Iowa, 368, 68 Am. Dec. 663. See, further, *Beronio v. Ventura etc. Lumber Co.*, 129 Cal. 232, 79 Am. St. Rep. 118, 61 Pac. 958; extended note to *Pryor v. Stone*, 70 Am. Dec. 349, 350.

Actual Occupancy of a Homestead is essential, in some states, to a valid claim of exemption: *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110, 18 South. 210. Compare *Bunker v. Coons*, 21 Utah, 164, 81 Am. St. Rep. 680, 60 Pac. 549; monographic note to *Pryor v. Stone*, 70 Am. Dec. 347-353; *Upton v. Coxen*, 60 Kan. 1, 72 Am. St. Rep. 341, 55 Pac. 284. There must be an occupancy in fact, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal or to complete needed repairs of a dwelling-house in process of construction. And this intention must not be a secret, uncommunicated purpose. It must be shown by acts of preparation of visible character or by something equivalent: See the monographic note to *Pryor v. Stone*, 70 Am. Dec. 347.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. OAKES.

[94 Tex. 155, 58 S. W. 999.]

NUISANCE—RIGHT TO USE LAND.—In determining to what uses land may properly be put by its owner, with reference to neighboring lands, the importance of the use to the owner, as well as the extent of the damage to be inflicted upon his neighbor, must be taken into consideration, and the rights of the parties adjusted in a practical way, the question being whether the proposed use is a reasonable one under all of the circumstances. (p. 839.)

NUISANCE—RIGHT TO PLANT GRASS OR CROPS INJURIOUS TO ADJOINING LAND.—The mere spreading to neighboring lands of Bermuda grass planted by a railway company upon its right of way does not render the company liable for the damages caused thereby, in the absence of proof that the planting of such grass was an unjustifiable use of the property, or that a person of ordinary prudence would not have so planted it. (pp. 842, 843.)

H. D. McDonald and J. W. Terry, for the appellant.

Allen & Dohoney, for the appellee.

¹⁵⁶ WILLIAMS, A. J. The certificate of the court of civil appeals presenting the questions which we are called upon to decide is as follows:

“This suit was brought by appellee against appellant to recover damages for injuries done the farms of himself and wife by the spreading of Bermuda grass thereon, in consequence of its having been planted by appellant on its right of way where it runs through said farms. The case thus alleged was established by the evidence, and the appellee recovered a verdict and judgment for two hundred dollars, from which appeal is prosecuted.

“The court instructed the jury that if appellant planted Bermuda grass upon its right of way where the same passes through said farms, and if said grass ‘by its nature was calculated and liable to spread to and upon adjacent lands and damage and injure the same,’ and if said grass did spread to and upon the lands of appellee and his wife, and if it injured and damaged said lands ‘for the purposes for which the same was then being used,’ to find for appellee; and refused an instruction to find for appellant, and also an instruction requested by appellant, ¹⁵⁷ as follows: ‘You are instructed that defendant railroad company had the right to improve its right of way

in any manner it saw fit that would tend to make the roadbed safer or better; but in doing this, defendant would be required to exercise such care and prudence to avoid injury to plaintiff as persons of ordinary prudence would commonly exercise under similar circumstances. Hence, if you believe from the evidence that the planting of the Bermuda grass by the defendant on its right of way through the farm of plaintiff and his wife tended to improve its roadbed, and that planting the same was such an act as a person of ordinary prudence would commonly do under like circumstances, then plaintiff is not entitled to recover, even though his and his wife's farms may have been injured by the grass spreading thereon from the right of way.' To the charge so given and to the refusal of the requested instructions, the errors are assigned.

"We deem it advisable to certify to your honors for decision the questions so raised—whether or not appellant was liable to appellee for the injury done to the lands through which appellant's railroad runs in consequence of the spreading of Bermuda grass thereon from appellant's right of way, or whether it was a good defense to the action that appellant had acted as a person of ordinary prudence would have done under the same circumstances in planting the grass upon its right of way."

The question to be decided is, whether or not from the bare facts that appellant planted the grass upon its right of way and that it spread to and injured adjacent farms of appellee, there results a liability for such injury on the part of appellant. These are the only facts stated for our consideration.

It is perhaps proper for the court to know judicially that this grass is much used and is valuable for pasturage, for the ornamentation of yards and lawns, and for the preservation of embankments; and that for the latter purpose it is often employed by railway companies in this state. In a general way we may know, too, that, by sending out roots and runners into adjacent soil, by the washing of water, and in other ways, it spreads and propagates itself, rapidly in some situations and kinds of soil, more slowly in others; and that it is often difficult to prevent or arrest this process or to cultivate other crops upon land where it has once become seated. But further than this we cannot go in taking cognizance of any facts affecting the questions.

The act for which appellant is sought to be made liable is therefore the use upon its own land of a thing which is useful for some purposes and is not shown to have been employed by it for an improper purpose. Does the owner of the land who uses it for the growth of useful grass of this kind thereby become absolutely liable for damage done to another by its spreading upon his land? If so, the facts stated show a liability on the part of appellant. But if the liability is not thus absolute, but depends upon peculiar conditions existing where the grass is planted, the plaintiff seeking to establish it would have the ¹⁵⁸ burden of showing the facts out of which it would arise. The law in the abstract has been sometimes stated broadly enough to establish a liability of the kind first mentioned. Thus in the much quoted case of *Fletcher v. Rylands*, L. R. 1 Ex. 265, Blackburn, J., says: "The question of law therefore arises, What is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the court of exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. . . . We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient." The act which the defendant in that case had done was to collect upon his land a large quantity of water in a reservoir, which, because of defective construction, broke and discharged its contents into plaintiff's mines. It has often been pointed out, especially by American courts and writers commenting on this decision, that the facts of the case established a lia-

bility because of negligence in the construction of the reservoir, but the court expressly waived the determination of any question of negligence, and put its decision on the broad proposition that the liability resulted absolutely from the fact that injury had been inflicted upon another by the escape of a thing brought by the defendant upon his land, which was likely to do mischief if it escaped and which he was bound, at his peril, to keep in. This decision was affirmed in the house of lords, and the proposition above quoted was expressly approved, although the judges delivering opinions used language which might otherwise be understood to be a modification of it: L. R. 3 H. L. App. Cas. 330.

There have been subsequent decisions in England which some authorities regard as relaxing the rule in *Fletcher v. Rylands*, L. R. 1 Ex. 265, but it is unnecessary to refer especially to them: *Cooley on Torts*, 677-680. The rule laid down was largely deduced from prior rulings establishing absolute liability for damages caused by fires kindled on one's premises and spreading to those of another; by injuries inflicted by one, in his lawful self-defense against another, upon an innocent bystander; and by animals straying from the lands of their owners upon those of ¹⁵⁹ others. The law has become settled, in this country at least, that there is no liability in the two first instances without negligence on the part of the person permitting the fire to spread or inflicting the injury; and in the case of animals, the law is entirely different in this and other states: *Clarendon etc. Co. v. McClelland*, 86 Tex. 179, 23 S. W. 576, 1100, 89 Tex. 483, 59 Am. St. Rep. 70, 34 S. W. 98, 35 S. W. 474.

By making the liability absolute, the rule in *Fletcher v. Rylands*, L. R. 1 Ex. 265, taken literally, imposes an unqualified restriction upon the right of an owner of land to put it to a use lawful in itself, and this is the aspect in which it has the most direct bearing upon the question before us. It so applies the maxim, "*Sic uter tuo*," etc., as to make the owner of land liable, in all cases, for loss or damage suffered by another in consequence of the escape of anything brought by the owner upon his land, which, in escaping, is likely to do mischief. Of course, the broad proposition was laid down with reference to such things as the court had in mind and should not, even if accepted as generally correct, be applied indiscriminately to other facts which, in their nature, are essentially different. Even if the rule stated were a just one

as defining the duty of one storing so dangerous and destructive an element as water is when moving in large volume, it should be applied with careful discrimination to things which, like grass, spread slowly and are subject to more or less control. The fact that the proposition as abstractly stated cannot be justly applied to all subjects which its terms embrace is enough to show that it is incorrect as a statement of a general principle of law. Accordingly, it has not met with general acceptance in this country, most of the authorities holding that liability for such injuries must be based upon negligence or other culpability on the part of the person sought to be held responsible. The authorities are so numerous as to make a review or even the citation of them all impracticable: Cooley on Torts, 776, 777; Bishop on Non-contract Law, 839, note 3; 1 Thompson on Negligence, 96; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 57 Am. Rep. 445, 6 Atl. 453; Loser v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Marshall v. Welwood, 38 N. J. L. 339, 20 Am. Rep. 394.

It is a general principle of law that the owner of property may use it as he chooses, in any lawful way; but another maxim, in general terms, requires him to so use it as not to injure another. The application of these principles gives rise to some of the most difficult questions and delicate distinctions known to the law. Bishop concisely states the general doctrine thus: "One may not, either voluntarily or negligently, cast earth or other substance from his own ground on a neighbor's; or upon his own bring or erect anything, or change the natural position of anything, from which the air, the moving water, or any other force of nature will bear to another on other land what is distinctly injurious to him; or, by any excavation, structure, or other change of his premises from their natural condition, render them unsafe to other persons and their property lawfully thereon; while yet these restraints will not be drawn so closely as substantially to deprive him of the use of his lands, ¹⁶⁰ or the ordinary pursuit of his own interests or to render him answerable for inevitable accidents injuring others": Bishop on Noncontract Law, sec. 829.

Since the owner may use his land as he chooses, if he does not violate any law, and is not to be substantially deprived of its use or of the ordinary pursuit of his own interests, but, at the same time, is required in its use to avoid injury to an-

other, it at once follows that he may be required to forego a particular use when it is not essential to the substantial enjoyment of his property and is fraught with unreasonable loss to his neighbor. On the other hand, the particular use may be so important to the owner and the loss or inconvenience to his neighbor so slight, compared to his, were he forbidden to so employ his property, that it would be unreasonable and unjust to impose such a restriction. In such cases, it is evident that all of the circumstances of the situation must be taken into consideration, the importance of the use to the owner as well as the extent of the damage to be inflicted upon his neighbor, and the rights of the parties are to be adjusted in a practical way, the question being whether or not the proposed use is a reasonable one under all the circumstances: 1 Wood on Nuisances, 3; Bishop on Noncontract Law, secs. 418, 842. We are unable to discover that the law does, or, from the nature of the subject, can furnish a more definite rule. For this reason, we think it cannot be laid down as a rule of law applicable to all circumstances and situations that one who plants Bermuda grass upon his premises makes himself liable for any damage that may result to his neighbor; nor, on the other hand, that he may not be liable under some circumstances and conditions. As is said in some of the authorities, there must, in such inquiries where rights and interest seem to conflict, be a balancing of them.

A great many cases have been adjudicated in the courts in which such acts as throwing upon the land or premises of another water, stones, rubbish, filth, smoke, dust, odors, gases, noises, vibrations, and the like have been held to constitute actionable nuisances. In some of these cases the act amounted to a direct invasion of another's possession of his land and a violation of his absolute right, while in others, one in the prosecution of his business, useful and lawful in itself, interfered with his neighbor's use and enjoyment of his property. But in the latter class of cases, all of the facts and circumstances of the situation were developed and considered, and the conclusion established that there was an unnecessary and unreasonable interference by one with the other.

The cases in which trees belonging to one overhang with their branches or penetrate with their roots the soil of another, inflicting special damage, have been adjudged to be nuisances at first sight appear to be analogous to this. But they are distinguished by the fact that a tree and all its roots

and branches belong to the owner of the soil upon which its trunk stands; and when its roots and branches extend upon the land of another, there is a direct invasion by the owner of the tree of the possession of such land and a use of it to maintain his ¹⁶¹ property, which is a violation of the absolute right of the adjacent owner to the exclusive possession and use of it. Grass, when it spreads upon and takes root in the adjacent soil, becomes the property of the owner thereof and he may do with it as he will, and hence there is no direct violation of his absolute right to the sole use and possession of his property. The question of liability, therefore, depends on the character of the act of introducing the grass, as before indicated: *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623; *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188; *Crowhurst v. Burial Board etc. of Amersham*, L. R. 4 Ex. 5; *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 302.

In the case of *McCutchen v. Blanton*, 59 Miss. 116, owners of farms sought to enjoin an adjoining proprietor from sowing upon his land the seed of Johnson grass, asserting that, if sown, the grass seeds and joints would be carried by wind, water, animals, and birds upon their lands and would there take root and spread and destroy its usefulness for the production of corn, cotton, and other crops. The supreme court said: "How far everyone has the right to plant in his own soil anything he pleases which is useful and beneficial, although the natural and probable consequence may be its spreading to the adjacent lands of others by the operation of what may be called natural causes, is, so far as we can learn, undecided by any court." After referring to and distinguishing other cases, the opinion proceeds: "But in this case we have a controversy between proprietors of the fee sustaining no other relation to each other than ownership of neighboring lands imposes as to the right of one to plant in his own soil. Certainly the complainants in this case have the right to devote their lands to cotton, corn, or other products, and to preserve them for the continued production of such crops. Perhaps the appellant has the same right to devote his land to a valuable and useful grass, even if his doing so shall ultimately cause the adjacent lands of others to be converted into grass fields, by causes other than his direct agency to produce such a result. We are met by conflicting rights. There must be a balancing of them. There should be no restriction of the just right of one further than is necessary

to protect another in the enjoyment of his. It may be an incident of the social state and contiguity of territory that each owner must bear the consequence of the exercise of the right of every other proprietor to pursue that particular kind of agriculture he may choose. It may be that unlimited freedom in this respect to each proprietor is the surest guaranty of the good of all. We will not decide this now, but content ourselves with the suggestions made and place our conclusion on other grounds as sufficient to sustain it." The injunction was refused because the evidence did not show with sufficient certainty that the sowing of the seed would result in the consequences averred.

It may be conceded that if a mischievous grass, not naturally growing upon land but brought there by its owner, would inevitably so spread upon adjoining farms as to destroy their capacity to produce any other crops, the introduction of it would be an unreasonable use of his land ¹⁶² by such owner, because it would force others to forego all other uses of their own property. And so it might be under other circumstances less extreme than those supposed. But it is obvious that to establish a liability of this sort, the evidence must show the facts necessary to give rise to it.

It is conceded by all authorities that damage or inconvenience sustained by one from a state of things naturally existing upon the land of another furnishes no ground of complaint against the latter.

In *Giles v. Walker*, L. R. 24 Q. B. Div. 656, the defendant had denuded his land adjoining plaintiff's of the timber which stood upon it, and thistles sprang up which the defendant failed to mow periodically, and in consequence their seeds were blown upon plaintiff's land and produced a heavy growth of the weed upon it. Plaintiff sued to recover for the damage thus done to his land. Chief Justice Coleridge said: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the land."

While Bermuda grass is not indigenous to the soil in this state, it may be found that in localities it has so long and so extensively grown that the reason of this rule would apply to it.

We have so far treated the question as if appellant occupied the position of any other land owner. It has the right to use the land acquired for its right of way for all purposes

proper to the prudent maintenance and operation of its road, and if Bermuda grass is useful as an instrumentality for keeping its roadbed in order, it has, we think, the right to so use it with the restrictions laid upon persons generally. The necessity or importance of using it may vary with the purposes to be accomplished thereby, and the limited extent to which such companies can use the land may influence the inquiry, whether or not, under all the circumstances, such a use is reasonable, but in this respect only is there a difference, affecting this question, between the rights of such companies and other land owners. They would not be liable for an act which is a reasonable use of the right of way for proper purposes further than natural persons would be: *Texas etc. Ry. Co. v. Meadows*, 73 Tex. 35, 11 S. W. 145.

In the case of *Brock v. Connecticut etc. R. R. Co.*, 35 Vt. 373, a company authorized to acquire a right of way and to operate and maintain a railway and required by law to fence its track, planted willow trees along the line separating its right of way from the adjoining lands, in low, marshy ground, intending that the trees should grow and furnish posts for its fence, and at the same time prevent the washing away of its embankment. Adjoining farm owners sued to enjoin the planting of the trees, alleging that they would spread their branches over and extend their roots into their land, and that sprouts would spring up therefrom and their lands would be so shaded, exhausted, and injured as to render them almost valueless for the purposes of cultivation. The court, after pointing out the great injury which the ¹⁶³³ evidence showed would probably be caused to the lands of complainants, said: "By their charter, the company were bound to fence their road, and it was in view of this obligation that the price to be paid was fixed upon by the commissioner or the parties, but evidently neither party contemplated that the road was to be fenced in this unusual and extraordinary manner, in a way that should virtually destroy or render nearly worthless an amount of land along the sides of the road nearly, if not quite, equal to the amount taken, and that, too, by the introduction into the farms of the willow tree, which some of the witnesses represent as the common enemy of the farmer in that vicinity, and one with which they have been contending half their lives, a tree that most of the witnesses seem to consider as injurious to the surrounding land to an extent beyond that of most other trees. Whether one of two ad-

joining land owners, holding their titles in fee, and for the ordinary purposes of cultivation, would have the right to construct a fence in this manner on the line between them to the manifest injury of the other, is a question we are not now called upon to decide. But we think, in order to justify the railroad company in resorting to this method of fencing their road, in view of its effect upon the adjoining proprietor, there must be some strong and controlling necessity for their doing so. And we are wholly unable to find from the evidence the existence of any such necessity. There would seem from the testimony to be no great difficulty, with but slight additional expense, in constructing a fence in the ordinary form that would withstand the freshets that the fences on this road are subject to." This extract will serve to show the facts made to appear upon which the relief was granted, viz., that the fencing was done in an "unusual and extraordinary manner," inflicting great damage upon others without any "strong and controlling necessity therefor," which facts are wholly absent from the present case.

Since the planting of the grass was not in itself unlawful and is not shown to have been done under circumstances to make it an unjustifiable use of its property by appellant, we conclude that it is not shown to be liable for the damage of which appellee complains.

The answer to the other branch of the question, whether or not it was a good defense that appellant, in planting the grass, acted as a person of ordinary prudence would have done under the same circumstances, is involved in what we have already said. While the ground of liability, if one can be shown, would be negligence or other culpable conduct on the part of appellant, nothing of the sort could be imputed to it if what it did was, under the principles stated, only a legitimate use of its property, and the facts stated fail to show that it was not such a use.

One May Use His Own Land for all purposes for which it is usually applied without being liable for consequential injuries to his neighbors, if he employs due skill and caution and no legal right is infringed. But his right to the use of his land is not absolute. It is qualified by the right of adjacent owners to the beneficial use and enjoyment of their property. If he goes beyond the limits of lawful use and creates a nuisance to his neighbors, he is liable without regard to negligence: See the note to *Hay v. Cohoes Co.*, 51 Am. Dec. 282; *Sullivan v. Durham*, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923. It has been held that if the roots of a tree run into and pollute a well on the lands of an adjoining owner, he may

have an action for damages, after a refusal by the owner of the tree to abate the nuisance: *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188. And the owner of land who wrongfully causes noxious vapors to rise on the lands of another is liable therefor: *Garland v. Aurin*, 103 Tenn. 555, 76 Am. St. Rep. 699, 53 S. W. 940.

JOHNSON v. ELMEN.

[94 Tex. 168, 59 S. W. 253.]

DEEDS—COVENANT AGAINST ENCUMBRANCE—PAROL EVIDENCE.—Notwithstanding a covenant against encumbrances in a deed, it may be shown by parol evidence that it was agreed between the parties at the time of the conveyance, and as part of the consideration, that the covenantee should himself discharge a particular encumbrance. (p. 847.)

DEEDS—PAROL EVIDENCE.—The effect of a deed, as a conveyance and as to its covenants, cannot be varied by parol proof. Thus, if there is a covenant against encumbrances, parol evidence is not admissible to show that a particular encumbrance was known to the covenantee, and was to be excepted from the operation of the covenant. (p. 847.)

Baldwin & Meek, for the appellant.

H. H. MacNicoll, for the appellee.

¹⁷¹ GAINES, C. J. This case comes to us upon a certificate of dissent from the court of civil appeals for the first district.

We take the following statement of the facts of the case from the opinion of the court:

“Appellant [Johnson] was the owner of certain lots in the city of Houston, which property was, at that time and at the time of the trial of this cause in the court below, worth about three thousand dollars and was encumbered with a lien to secure an indebtedness of two thousand dollars. . . . The appellee, C. A. Elmen, was the owner of a tract of three hundred and twenty acres of land in Harris county, worth at that time and at the time of trial of this cause about fifteen hundred dollars. The six hundred and forty acre tract of land of which this three hundred and twenty acres is a part was at that time encumbered by a vendor's lien to secure two notes of two hundred and fifty dollars each, besides interest and attorney's fees. . . . Appellant, through his duly authorized agent and attorney, Stewart Johnson, commenced nego-

tiations with said appellee with a view of trading him the lots above mentioned for the three hundred and twenty acres of land, and on said date it was verbally agreed between the parties that the said C. A. Elmen would convey to appellant the three hundred and twenty acres of land subject to said ¹⁷² encumbrance, and that appellant would convey to said Elmen the lots above mentioned and pay him seven hundred dollars in consideration of the conveyance of said land, said lots to be also conveyed subject to said lien of two thousand dollars, each of said parties agreeing to accept the property conveyed subject to the liens before mentioned. In pursuance of this agreement, Elmen prepared a deed conveying the three hundred and twenty acres of land to appellant, which deed recited a consideration of seven hundred dollars cash in hand paid, the conveyance of the lots to Johnson, and the assumption by Johnson of the payment of the vendor's lien notes upon the land. Johnson did not accept this deed, and stated that he did not want the vendor's lien notes mentioned in the deed, as he intended to pay them off in the next ten days, and that he would prepare a deed for Elmen to execute. Thereupon the said Stewart Johnson prepared deeds for both parties which were by them executed and the deed prepared by Elmen was destroyed. The deeds executed by the parties were each general warranty deeds and each contained the words, 'have granted, bargained, sold, and conveyed, and do by these presents, grant, bargain, sell, and convey.' The deed from Elmen to Johnson recited the consideration to be seven hundred dollars and the exchange of other property, and made no reference to the vendor's lien notes before mentioned. The deed from Johnson to Elmen recited that the lots are conveyed subject to the two thousand dollar lien. The appellant Johnson agreed and promised appellee that he would pay the vendor's lien notes, and his assumption of these notes was a part of the consideration for the conveyance to him by appellee of the three hundred and twenty acres of land. On the day after the execution of these deeds, the appellant mortgaged the three hundred and twenty acres of land to secure notes for the sum of two thousand dollars, which notes and mortgage have never been paid or satisfied in any way.

"Appellant failed to pay the vendor's lien notes on the three hundred and twenty acres of land, and . . . W. C. Corbett, who was the owner and holder of the notes, filed suit thereon and recovered a judgment foreclosing his lien. . . . Appellee

Elmen was not made a party to this suit, but appellant was one of the parties defendant therein and failed to answer or make any defense to said suit. Under this judgment of foreclosure, the three hundred and twenty acres of land was sold and bought in by Corbett, and appellant was thereby ousted from possession and divested of the title of the same."

The form of the deed from the appellee to appellant being such as to imply a covenant against encumbrances, the latter brought suit for a breach of the covenant and sought to recover the property conveyed by him upon the ground of a failure of consideration.

The trial court admitted evidence of the parol agreement to pay the vendor's lien upon the land conveyed by Elmen to Johnson, and upon appeal the court of civil appeals upheld that ruling, one of the judges dissenting. This presents the question which has been certified for our determination.

The cases in which the question of the admissibility of parol evidence to affect a covenant against encumbrances in a deed conveying land may be divided into three classes.

¹⁷³ In many cases it has been sought to show that one or more encumbrances were known to the covenantee and to exclude such from the operation of the covenant. But it is held, certainly by the great weight of authority, that this cannot be done. A sufficient reason for the rule is that the covenantee in many instances may insist upon the covenant for the very purpose of guarding against encumbrances which he knew to exist. In other cases, it has been held that parol evidence cannot be admitted to show merely that the parties orally agreed that a certain encumbrance should be excepted from the operation of the covenant. To admit such evidence is to violate the familiar rule that parol evidence is not admissible to vary the terms of a written contract. So far, the courts are in practical accord. But whether or not, notwithstanding a covenant against encumbrances in a deed, it may be shown by parol evidence that it was agreed between the parties at the time of the conveyance and as a part of the contract, that the covenantee should himself discharge an encumbrance, is a question of more difficulty and one upon which there is a conflict of authority. We think, however, the rule that in such cases parol evidence is admissible is supported by the better reason and the weight of authority.

A deed may contain all the terms of the contract of sale between the parties to it. This occurs where the purchase

money is fully paid at the time of the execution of the instrument and its payment is acknowledged in the deed. Again the recitals may be so explicit as not only to show all the stipulations on part of the grantee but also to exclude the existence of any other. In other words, the conveyance, with its recitals, may be such as to make it apparent upon its face that it contains all the terms of the contract between the parties. But for the reason that the conveyance must be in writing in order to pass the title, it sometimes occurs that the deed is but a part of the contract, and that there are other stipulations on part of one or both of the parties which do not appear upon its face. When such other terms of the contract are not required by law to be in writing, they may be proved by parol evidence and given their proper legal effect—subject, however, to the rule that the effect of the deed as a conveyance and as to its covenants cannot be varied by such proof. Parol evidence cannot be admitted to show that more or less land was agreed to be conveyed than appears in the deed itself, nor, where there is a covenant against encumbrances, that a particular encumbrance was to be excepted which is not excepted in the writing. Thus, as a rule, a consideration different from that recited in the conveyance may be shown by parol evidence. It is clear, therefore, that, in the absence of a covenant against encumbrances in the deed in question, the appellee would have been permitted, in any proceeding in which the question could have arisen, to prove by such evidence that, as a part of the consideration for the conveyance of the land, the appellant agreed to pay the notes which were a charge upon it. But there being a covenant against encumbrances in this case, the result of such proof is the same as if the notes which were secured by a vendor's lien upon the land had been expressly excepted from the covenant. ¹⁷⁴ The question presents itself, whether, because of the resulting effect upon the covenants in the deed, the grantor is deprived of the right of showing the assumption of the notes on the part of the grantor—a right which would clearly have been his had he not covenanted against encumbrances. While there is very high authority to the contrary, we are of opinion that it does not. The agreement of the grantee to pay the notes was a part of the contract for the exchange of the lands; but was not a necessary part of either conveyance. It was an additional consideration which the appellant was to pay for the premises conveyed to him, which, as a general rule, as we have seen, may be established

by parol evidence. It was a part of the original contract which was agreed upon between the parties, and which was finally consummated by their respective conveyances. The ground upon which the authorities which hold parol evidence inadmissible in such a case proceed, is that the effect of the proof is to except the encumbrance from the covenant and thus to vary the contract as shown by the writing. But does proof of the promise to discharge the debt which is a lien upon the land except anything from the covenant? Does it conflict with or is it inconsistent with the terms of the conveyance? We think not. Clearly, in a suit for a breach of a covenant against encumbrances, it could be shown that a lien had been discharged either before or at the time of or after the execution of the deed; and we think that the effect of the promise which was proved by parol in this case was not to except the vendor's lien notes from the covenant, but was to show that as between the parties to the contract the encumbrance had been discharged. In a case which, we think, is not to be distinguished in principle from this, the supreme court of Pennsylvania say: "This being so, this mortgage was, as between the grantors and the corporation grantee, paid": *Johnston v. Markle Paper Co.*, 153 Pa. St. 195, 25 Atl. 560, 885. Is the appellant to be permitted to claim a right by reason of the nonpayment of a debt, which, by his own promise, he became primarily liable to pay? Does it lie in his mouth to complain that his grantor has not done that which he bound himself to do? The lien remained after his promise, but as between him and the grantor, it was no longer an encumbrance resting upon the latter, but one which he had taken upon himself. It seems to us that although this is a question of law, the equitable principle should apply, that that is considered as done which ought to be done, and that as between the parties, the lien should be held to be discharged.

We are aware that our text-writers lay down the rule that parol evidence is not admissible in such cases and claim that it is supported by the weight of authority: 1 Jones on Real Property, sec. 862; 2 Devlin on Deeds, sec. 914. Such, also, seems to be the opinion of the author of Rawle on Covenants for Title, fifth edition, section 88, and notes. As we have previously said, it seems to us that the weight of authority is the other way. In the following cases where the precise question was presented, it was ruled that parol evidence was admissible: *Sidders v. Riley*, 22 Ill. 109; *Wachendorf v. Lancaster*,

66 Iowa, 458, 23 N. W. 922; Blood v. Wilkins, 43 Iowa, 567; Strohauer v. Voltz, 42 Mich. 444, 4 N. W. 161; Landman ¹⁷⁵ v. Ingram, 49 Mo. 212; Miller v. Fichthorn, 31 Pa. St. 252; Johnston v. Markle Paper Co., 153 Pa. St. 195, 25 Atl. 560, 885; Hays v. Peck, 107 Ind. 389, 8 N. E. 274. The decision in the case last cited is the more pointed, since the same court within a few days thereafter held that parol evidence was not admissible to show, as against covenants in a deed, that it was agreed between the parties at the time of the conveyance that the grantee was to assume and pay off a certain dower interest in the land—calling it an encumbrance. The court ruled that it was not an encumbrance, but an interest in the land itself, and that the effect of the evidence was to vary the deed and that it was not admissible.

A portion of the opinion in the case of Miller v. Fichthorn, 31 Pa. St. 252, above cited, was quoted with approval by this court in the case of Thomas v. Hammond, 47 Tex. 42, and with reference to the case, the court say: "In that case, Miller was sued on his obligation for two hundred and ninety-three dollars, the balance of the purchase money of land conveyed to him by Fichthorn, for an expressed consideration of five hundred and fifty dollars, and which land, at the time of the conveyance, was subject to the lien of a judgment against a prior owner for two hundred and two dollars and thirty-four cents, under which the property was subsequently sold by the sheriff. The question seems to have been, Whose fault was it that the land was sold? And the plaintiff was allowed to show that the party who contracted for the land and had it conveyed to Miller at the time of the delivery of the deed agreed to pay the judgment lien, in addition to the two hundred and ninety-three dollars, for which he gave his obligation. This case, in its facts, and in the questions involved, is not unlike the case in hand." In Thomas v. Hammond, 47 Tex. 42, however, it does not appear that there was any express covenant against encumbrances, though there might have been one implied, as in the present case, from the language of the conveyance. The conveying clause does not appear in the report of the case.

In Massachusetts it is held that parol evidence is not admissible in a case like the present: Simanovich v. Wood, 145 Mass. 180, 13 N. E. 391; Flynn v. Bourneuf, 143 Mass. 277, 58 Am. Rep. 135, 9 N. E. 655. The supreme court of Minnesota probably holds the same view, though the case decided by them

did not present the exact question presented in the present case: *Burns v. Schreiber*, 43 Minn. 468, 45 N. W. 861.

For the reasons given, we are of opinion that the majority of the court of civil appeals was correct in holding that parol evidence was admissible to show that at the time of the execution of the deed in question it was agreed between the parties that the grantees assumed the payment of the notes which were a charge upon the premises, and our opinion will be so certified.

Parol Evidence to Vary Writings is discussed in the monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659-672. If a deed purports to contain all the covenants of the grantor with respect to the land conveyed, an additional covenant cannot be added by parol: See the monographic note to *Green v. Batson*, 5 Am. St. Rep. 199, on parol evidence to show warranties outside of contracts.

WESTERN UNION TELEGRAPH CO. v. SNODGRASS.

[94 Tex. 284, 60 S. W. 308.]

TELEGRAPH COMPANIES—GRATUITOUS SERVICE.—If a telegraph company accepts a message for transmission without compensation, it is not necessary for the receiver of the message to allege and prove as a prerequisite to his right to recover for negligent delay in its delivery payment or obligation to pay for its transmission. (p. 851.)

TELEGRAPH COMPANIES—GRATUITOUS SERVICE—NEGLIGENT DELAY.—If a telegraph company accepts a message for transmission without compensation, having the right to charge toll therefor, a want of consideration is no defense to an action for damages arising out of its negligence in failing to deliver it. (p. 851.)

N. J. Kittrell and Webb & Tinley, for the appellant.

C. A. Keller and M. Williams, for the appellee.

²⁸⁷ BROWN, A. J. The court of civil appeals for the fourth district has certified to this court the following statement and question:

“This suit was brought by the appellee against the Western Union Telegraph Company to recover damages on account of the alleged negligence of the latter in failing to deliver him the following message within a reasonable time:

*** Number 151.**

“ ‘Sent by S. A. Z. B. J. Rec’d by S. D. H. Received at,
“ ‘Dated, San Antonio, Texas, Oct. 18.

* To William C. Snodgrass, N.

" 'No. 345 Main St., Second Floor, Dallas, Texas:

"Come next train. Mamma sinking.

"'ANNIE SNODGRASS. 7:13 P.'"

“Annie Snodgrass, the sender, is a sister of the appellee, to whom the dispatch was addressed, and was acting as his agent and at his request in sending the telegram. At the time she sent the telegram she was appellant's bookkeeper in its offices at San Antonio; and the manager of the company, for her accommodation, allowed her to send the message free and no charge was made for its transmission, nor was any toll paid for it either by the sender or sendee.

“The appellant failed to exercise ordinary care in delivering the message to appellee, and on account of the delay occasioned by such failure, it was not received by appellee in time to reach his mother’s bedside before her death; but if appellant had exercised ordinary care, he would have received it in time and gone to see her before she died. On account of his inability to reach his mother after receiving the message before her death, he sustained great mental pain and anguish.

“The petition of appellee does not allege any payment to appellant, or any pecuniary obligation incurred to it by anyone for the transmission of the message, and the undisputed evidence shows there was none.

“Question. Was it necessary for the appellee to allege and prove, as a prerequisite to his right of recovery, payment or obligation of payment to appellant by either him or his sister for the transmission of the telegram?”

To the question propounded, we answer no. The telegraph company was bound to accept and transmit messages presented to it, with the right to charge toll therefor. Having accepted the message for transmission without compensation, a want of consideration is no defense to an action for damages arising out of its negligence in failing to deliver it: *Glavin v. Rhode Island Hospital Co.*, 12 R. I. 411, 34 Am. Rep. 675; *McCandless v. McWha*, 22 Pa. St. 269; *Coggs v. Bernard*, 3 Salk. 11, 1 Smith Lead. Cas., 8th ed., 369; Wharton on Negligence, sec. 505 et seq.; Story on Bailments, sec. 182.

In the case of *Glavin v. Rhode Island Hospital Co.*, 12 R. I. 411, 34 Am. Rep. 675, plaintiff sued for damages suffered through unskillful treatment by an ~~288~~ employé of the hospital, a corporation, and, among other things, it was claimed in defense that the treatment was gratuitous, therefore the defendant was not liable for damages arising out of the failure of its employé to use proper skill. The court said: "We understand the doctrine of the cases which we have just been considering to be this: That where there is a duty, there is, prima facie at least, liability for its neglect, and that when a corporation or quasi corporation is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation or quasi corporation to exercise such care and skill; and that the fact that it acts gratuitously and has no property of its own in which it has beneficial interest will not exempt it from liability for any neglect of duty, if it has funds, or the capacity of acquiring funds, for the purposes of its creation which can be applied to the satisfaction of any judgment for damages recovered against it."

In *Coggs v. Bernard*, 3 Salk. 11, 1 Smith Lead. Cas., 8th ed., 369, before cited, the plaintiff sued the defendant for having negligently caused the destruction of some casks of brandies while gratuitously removing them from one place to another. Lord Holt said: "But, secondly, it is objected that there is no consideration to ground this promise upon, and therefore the undertaking is nudum pactum. But to this I answer that the owners trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but, in such a case as this, it signifies an actual entry upon the thing and taking the trust upon himself. And if a man will do that and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing."

The authorities are uniform that whenever a person receives the property of another and gratuitously undertakes to perform some act with reference to it, negligence in the performance of the act will not be excused by the want of consideration. This case is fully within the letter and the spirit of the

authorities, and there was no necessity for the plaintiff to allege that any sum was paid, or agreed to be paid, for the service of transmitting and delivering the message.

Gratuitous Service.—If the situation or employment of one acting gratuitously implies ordinary skill or knowledge adequate to the undertaking, he will be held responsible for injuries resulting from the want of exercise of that skill or knowledge: *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675. A gratuitous bailee, ordinarily, is liable for gross negligence only: *Gray v. Merriam*, 148 Ill. 179, 39 Am. St. Rep. 172, 35 N. E. 810; *Hibernia Bldg. Assn. v. McGrath*, 154 Pa. St. 296, 35 Am. St. Rep. 828, 26 Atl. 377. Telegraph companies are treated as common carriers: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068. Compare *Birkett v. Western Union Tel. Co.*, 103 Mich. 361, 50 Am. St. Rep. 374, 61 N. W. 645. But a party is a common carrier only as to such goods as he undertakes to carry for hire: *Knox v. Rives*, 14 Ala. 249, 48 Am. Dec. 97.

HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY v. McCARTY.

[94 Tex. 298, 60 S. W. 429.]

RELEASE FOR PERSONAL INJURY.—If a person who has a claim against another for personal injuries agrees upon a release and settlement of his claim, and accepts a sum of money or other thing of value in such settlement, he is, in the absence of fraud or concealment, concluded by the settlement, notwithstanding the future development of other injuries from the same cause. (p. 856.)

RELEASES—SUBSEQUENTLY DEVELOPED INJURY—MISTAKE.—A contract of release in full of all damages which have accrued, or which may thereafter accrue, for personal injuries received in an accident is binding as to all injuries developed as the result thereof, whether known or unknown at the time when the contract is made, and it cannot be avoided on the ground of mistake in the belief that only certain injuries had been received, so as to permit recovery for other injuries developed after its execution and for which no adequate compensation was made. (p. 859.)

Baker, Botts, Baker & Lovett and F. Andrews, for the appellant.

Baldwin & Meek, for the appellee.

299 GAINES, C. J. This case comes to us upon a certified question. The certificate is as follows:

“Appellee, while a passenger on one of appellant's passenger trains, was injured in a wreck caused by the actionable negligence of appellant. He was promptly taken to appellant's infirmary at Houston that his injuries might be dressed and cared for. While there, appellant's claim agent began to negotiate with him for the settlement of his claim against the company. At that time, appellee appeared to have sustained no other injury except a dislocation of his ankle, and it was shown by the evidence that no other injuries were considered by the parties to the settlement, and no other injuries entered into and in fact formed any part of the consideration for the settlement, except the loss of a watch, which was included in the settlement at a valuation of thirty dollars. Neither the appellant's agents nor appellee knew or suspected injury to any other part of appellee's ⁸⁰⁰ person, and appellee exercised reasonable care to ascertain if he was otherwise injured. The sum accepted in settlement was grossly inadequate and out of proportion to the injuries to other portions of his body, which, though at that time unknown, were shortly thereafter discovered to exist, and appellee could not have been induced to settle for the sum named in the release had he been aware of his real condition. When the amount was agreed upon, appellee executed a release in writing, which was prepared by the company's agent for his signature. Said release is in the following language:

“‘Know all men by these presents, that I, Charles McCarty, of the town of Welborn, Texas, for and in consideration of the sum of four hundred and thirty dollars to me in hand paid by the Houston and Texas Central Railroad Company, of the state of Texas, have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors, administrators, and assigns, remise, release, and forever discharge the Houston and Texas Central Railroad Company of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever, which I had or have now, or which I or my heirs, executors, administrators, or assigns can, shall, or may have by reason of any damage or personal injury sustained by me in the wreck of the south-bound passenger train No. 4, of said Houston and Texas Central Railroad at Fairbanks yesterday morning at 5 o'clock, on which train I was a passenger, and on my way from Welborn to Houston, or by reason of any matter, cause, or thing whatsoever.

"In testimony whereof I have hereunto set my hand and seal on this, the twenty-eighth day of April, 1897.

(Signed) "CHAS. McCARTY. [L. S.]

"Witness:

"J. R. STUART.

"E. L. ADAMS."

"Shortly after the execution of this release, appellee discovered that he had sustained injuries to his spine and bowels which were of a much graver and more permanent nature than the injury settled for, and which would practically destroy his usefulness for the remainder of his life. Whereupon he brought this suit to set aside the release and recover for the additional injuries. The grounds upon which he sought to set it aside were that both he and appellant's agents were mistaken in supposing he had sustained no other injuries than a dislocated ankle; that no other injury save that to the ankle was considered or entered in any way into the settlement; that he could not have been induced to settle had he known of these other and graver injuries, and that believing, and having reason to believe, that he had no other claim against the company, he was induced to receipt them in full in the general terms used in the release.

"The question of primary liability on the part of appellant and the issue of mistake as affecting the validity of the release, in so far as it ³⁰¹ purported to be a bar to recovery for the unconsidered injuries, were submitted to a jury and the trial resulted in a verdict for appellee, the recovery being confined by the charge of the court to only such damages as appellee had sustained by reason of the unconsidered injuries, no damages being allowed for the injury to the ankle, which the court held had been settled for in full, as evidenced by the release.

"The question presented and which we respectfully certify is as follows: Can the release in question be set aside (except in so far as it evidences a discharge for injuries to the ankle) on parol proof that the parties thereto were mistaken in supposing that the injury to the ankle was the only injury which appellee had sustained, it also being made to appear by parol that notwithstanding the language of the writing no other injury was in the minds of the parties, and that if the other injuries had been known, the release would not have been executed?"

In *Gilliam v. Alford*, 69 Tex. 267, 6 S. W. 757, the court, speaking through the late Chief Justice Stayton and quoting from Pomeroy's Equity Jurisprudence, announced the rule in regard to voluntary settlements as follows: "The rule in such cases is, that 'voluntary settlements are so favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge or means of obtaining knowledge concerning the circumstances involving those rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they have voluntarily entered must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision.' " We are unable to see any circumstance in this case to take the release out of the general rule. The appellee, who was the plaintiff in the court below, had at least the same knowledge and the same means of obtaining knowledge as the appellant, and if there was no fraud in the transaction, the settlement was binding upon him. That where a party who has a claim against another for personal injuries agrees upon a settlement of his claim and accepts a sum of money or other thing of value in settlement of such claim, he is, in the absence of fraud or concealment, concluded by the settlement, is a proposition sustained, as we think, by the great weight, if not by an unbroken line, of authority. We cite some of the cases: *Rideal v. Great Western Ry. Co.*, 1 Fost. & F. 706; *Kowalke v. Milwaukee Electric Ry. etc. Co.*, 103 Wis. 472, 74 Am. St. Rep. 877, 79 N. W. 762; *Seeley v. Citizens' Traction Co.*, 179 Pa. St. 334, 36 Atl. 229; *Alabama etc. Ry. Co. v. Turnbull*, 71 Miss. 1029, 16 South. 346; *Homuth v. Metropolitan Street Ry. Co.*, 129 Mo. 643, 31 S. W. 903. The case first cited (*Rideal v. Great Western Ry. Co.*, 1 Fost. & F. 706) was very like the case before us, in the respect that the injuries, at the time of the release, appeared trivial, but that there was testimony tending to show that afterward they proved to be serious and permanent. In the charge to the jury, the court say: "No doubt a man might well be ready to take a certain sum in satisfaction of such injuries as he was ³⁰² sensible of, which would not be any equivalent for serious and permanent injuries. Still if, in fact, a man has done so, he is bound by his bargain." In the Wisconsin case (*Kowalke v. Milwaukee Electric etc. Co.*, 103 Wis. 472, 74 Am. St. Rep.

877, 79 N. W. 762, the court dispose of the question of a mistake of fact and thus announce the limitations upon the rule, which justifies an interference by the courts upon that ground: "The most philosophical definition we have found is that presented by Pomeroy (Pomeroy's Equity Jurisprudence, sec. 839): 'An unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract.' This definition contains several elements, each of which, as above suggested, must be explained and qualified in its practical application. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge whether a fact which may or may not exist does so: Kerr on Fraud and Mistake, 432. This idea is involved in, and furnishes a reason for, the exception pointed out by Dixon, C. J., in *Hurd v. Hall*, 12 Wis. 112, 127, on authority of *Kelly v. Solari*, 9 Mees. & W. 54, viz.: Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense. These limitations are predicated upon common experience, that, if people contract under such circumstances, they usually intend to abide the resolution either way of the known uncertainty, and have insisted on and received consideration for taking that chance."

The cases relied upon by counsel for appellee do not, in our opinion, sustain their contention. We will notice some of them. In *Lyall v. Edwards*, 6 Hurl. & N. 337, the defendants to an action of trover pleaded a release, and the plaintiff replied, in substance, that the defendants being insolvent, they, in connection with the other creditors, and in consideration of an assignment of the property of the defendants for the benefit of all their creditors, executed the release, but that at the time of its execution, without default on their part, they were ignorant that their goods had been converted. Upon demurrer, it was held that the replication was good. There the claim in dispute was a distinct cause of action of which the plaintiffs had no knowledge, and the existence of which they had no reason to suspect at the time the discharge was executed. It seems to us the release was properly construed not to embrace such claim. The gist of ruling in *Ramsden v. Hylton*, 2 Ves. Sr. 304, appears in the following headnote: "General release from a sister to a brother not binding as to particular rights under the marriage settlement, or articles of the parents, the sister being ignorant of them, and the brother hav-

ing covenanted that he was seised in fee, contrary to the fact." In passing upon the release, Lord Hardwicke says: "The strongest and most material objection is the release; but I am of opinion it would not be construed as a release of this demand, either in point of law, or in a court of equity. First, it is certain that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, ~~will~~ will construe it to relate to the particular matter recited, which was under the contemplation of the parties, and intended to be released." There, too, the matter in dispute was the release of a separate demand. The case of *Lumley v. Wabash Ry. Co.*, 76 Fed. 66, 6 American and English Railway Cases, new series, 81, is more like the case before us. But in that case, the release specified certain injuries, but concluded with a general release of all demands growing out of the accident. In their opinion, the court say: "We put our judgment upon the facts stated in this bill, to wit, that both parties supposed complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed. This jurisdiction is well known, and has frequently been applied in cases of release affecting property rights, both in courts of law and equity." This, it seems to us, is a mere application of the rule announced by Lord Hardwicke in the case of *Ramsden v. Hylton*, 2 Ves. Sr. 304, above cited. The same rule was applied in the case of *Union Pacific Ry. Co. v. Artist*, 60 Fed. 365. The other cases cited by appellee are less applicable to the facts before us and require, as we think, no especial comment.

The case before us is, in our opinion, clearly distinguishable from *Lyall v. Edwards*, 6 Hurl. & N. 337, cited above. There the unknown matter was a separate cause of action, which would not have been concluded by a judgment upon the claims which were in contemplation of the parties at the time the release was executed. Here there is but one cause of action; and if the plaintiff had sued and recovered for the injuries

of which he had knowledge at the time of the release, he would have been precluded from an additional recovery.

This case is also clearly to be distinguished from the Lumley case and the other cases on that line. In those cases, the contract was neither set aside nor impaired by reason of any mistake of the parties to the release. There, by a rule of construction, the operation of the release is restricted to the particulars mentioned. Here no particular injuries are mentioned. The release is of all damages which have accrued or which may accrue to the plaintiff by reason of the accident in which he was injured. Here, then, the terms of the release are not to be mistaken and the contract is not open to construction. In the face of such an instrument, it cannot be said that all the injuries which might be developed as a result of the accident, whether known or unknown, were not in the contemplation of the parties to the instrument, and were not embraced within its terms. In all such cases, the damages are ascertainable in a legal sense, but in fact are uncertain in amount. Until the extent of the injuries has been clearly developed, they may ³⁰⁴ be more or may be less than appearances would indicate, and therefore in every settlement of the character of that under consideration, the parties take the chances of future development—the one of paying more than an adequate compensation for the wrong inflicted, and the other of receiving less.

Our conclusion is that the release embraces all damages resulting from the injuries of the plaintiff; and that it cannot be varied by parol evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties.

We therefore answer the question in the negative.

A Release of a Claim for Damages for personal injuries cannot be avoided on the ground that it subsequently appears that they are more serious than apprehended at the time of the settlement: Kane v. Chester Traction Co., 186 Pa. St. 145, 63 Am. St. Rep. 846, 40 Atl. 320. See, further, the monographic note to Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 507-513; Brown v. Electric Co., 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415; Beck v. Pennsylvania R. R. Co., 63 N. J. L. 232, 76 Am St. Rep. 211, 43 Atl. 908.

STEVENS v. STONE.

[94 Tex. 415, 60 S. W. 959.]

JUDGMENTS—ACTIONS UPON.—A judgment creditor cannot maintain an action upon his judgment without showing some advantage to be gained thereby; but if it is made to appear that a second judgment may be in any respect more available than the first, the action should be allowed. (p. 862.)

JUDGMENTS—ACTIONS UPON.—If a judgment is not dormant, and it appears that a new judgment thereon would be available in another jurisdiction where the defendant has property which cannot be reached under the first judgment because of the statute of limitations, an action may be maintained thereon. (p. 862.)

JUDGMENTS—ACTIONS UPON—LIMITATIONS.—The statute of limitations of ten years applies to actions upon judgments, and such actions are not barred until the lapse of that period of time from the issuing of the last execution thereon. (p. 863.)

Davis & Gamett, for the appellant.

Cruce, Cruce & Cruce and Eldridge & Gardner, for the appellee.

⁴¹⁷ GAINES, C. J. The plaintiff in error brought this suit against defendant in error to recover upon a judgment. A demurrer was sustained to the petition, and the plaintiff having declined to amend, judgment final was rendered against him, which judgment was affirmed upon appeal.

It appears from the allegations of the petition that on the ninth day of June, 1885, the plaintiff recovered in the district court of Cooke county a judgment against the defendant and four others for the sum of nine thousand five hundred and twenty-six dollars and costs of suit; that the judgment is unpaid and that executions have been issued thereon so as to prevent its becoming dormant. It also appears that two of the defendants in the judgment are dead and that two others are nonresidents of the state and are insolvent. It is also alleged that the present defendant, W. F. Stone, has not sufficient property in Texas to satisfy the judgment, but that he is a man of large means and has ample property in the Indian Territory out of which the debt can be satisfied, and in effect that, by reason of the long lapse of time since the judgment was rendered and the laws of limitation in that territory, it is not there available as a cause of action.

Where no advantage can accrue to a plaintiff in a judgment by a second suit upon it, we fail to see that there is any pro-

priety in allowing such suit. It is a narrow view of the subject, as we think, to say that the judgment is an evidence of debt, and that a debt will support a cause of action. The purpose of judicial actions is to afford remedies for the enforcement of rights, and where the result of a suit prosecuted to success is to give the plaintiff no better remedy for the enforcement of his right than he had before, no reason other than a technical one can exist for permitting its prosecution. Since equity discourages a multiplicity of suits and will in a proper case enjoin vexatious litigation, and since under our blended system equitable principles in every case have their full scope and effect, it would seem that our court should never allow a suit upon a judgment unless it should be made to appear that the second judgment would be more efficacious than the first. Yet it is broadly held by the great weight of authority that a judgment will support an action without allegation and proof of any additional advantage to be secured by the second recovery. The cases are too numerous for special citation, but will be found exhaustively collated in 11 Encyclopedia of Pleading and Practice, page 1085 et seq. See, also, for elaborate discussion of the question and the authorities, *Pitzer v. Russel*, 4 Or. 128; *Solen v. Virginia etc. R. R. Co.*, 15 Nev. 313. It may be that the American courts which hold that there is an absolute right to sue upon a judgment proceed upon a misapprehension of the ruling of the English courts. It seems that at common law interest upon a judgment was not ⁴¹⁸ recoverable by an execution upon it, and that therefore a second action upon it was necessary in order to secure the interest. Also in some cases a second judgment gave the judgment creditor the right to a *capias* for the satisfaction of his debt when he did not have that right under his first judgment. Therefore, we are inclined to hold with the intimation of this court in former cases (*Johnson v. Murphy*, 17 Tex. 216; *Parks v. Young*, 75 Tex. 278, 12 S. W. 986), that a judgment creditor cannot maintain an action upon his judgment without showing some advantage to be gained thereby. But however that may be, we are clearly of opinion that where it is made to appear that a second judgment may be in any respect more available than the first, the action should be allowed. This was in effect decided by this court in the cases of *Masterson v. Cundiff*, 58 Tex. 472, and *Anderson v. Boyd*, 64 Tex. 108. In each of those cases, the action was permitted in order that the plaintiff might, by a new judgment, fix a

lien upon the lands of the defendant—the lien of the first judgment having been lost.

Applying the principle of the cases last cited to the case before us, we think the petition shows a sufficient reason for bringing suit upon the judgment. If an action on the judgment be barred by the laws of the Indian Territory, and if the defendant has property there subject to execution, then the second judgment is clearly more available than the first, and the action is not futile.

In this connection we will say that the proposition announced in *Parks v. Young*, 75 Tex. 278, 12 S. W. 986, that there was "no authority for bringing a second action upon a judgment that is not dormant" is clearly erroneous. The mistake is that of the writer of the present opinion and is to be regretted, since it probably led the lower courts into holding that the petition in this case was bad upon general demurrer. The proposition was hardly necessary in the decision of that case. The plaintiff there had sued out an attachment upon an open account and had seized personal property for the satisfaction of his debt. The property had been sold and the proceeds of the sale deposited with the clerk of the court. By an amended petition, he then alleged that since suing out his attachment he had recovered a judgment for another debt in a justice court and sought to have any surplus that might remain after satisfying his original cause of action applied to the payment of that judgment. It is quite clear that this surplus could not properly be applied to the payment of any debt, whether evidenced by judgment or not, except that upon which the attachment was sued out. It does not appear from the report of the case whether the appellant assigned error upon the refusal of the court to render a simple judgment upon the judgment set up in the amended petition or not. If so, the case would be authority for the proposition that in this state, in order to maintain an action upon a judgment, the plaintiff must show that some advantage will accrue to him by the rendition of a new judgment.

The defendant also pleaded by way of special exception to the ⁴¹⁹ petition the statute of limitations of four and ten years. The statute of ten years applies to actions upon judgments, and such actions are not barred until the lapse of that period of time from the issuing of the last execution: Rev. Stats., art. 3361; *Willis v. Stroud*, 67 Tex. 516, 3 S. W. 732. It is alleged in the petition that executions issued on the judg-

ment November 19, 1885, April 19, 1886, June 30, 1886, and on June 25, 1896. Hence it is clear that under the decisions of this court the suit was not barred.

We are of opinion that the trial court and the court of civil appeals erred in sustaining the demurrers to the petition and therefore their judgments are reversed and the cause remanded.

An Action Lies on a Judgment though it may be enforceable by execution: *Eldredge v. Aultman*, 35 Neb. 884, 37 Am. St. Rep. 476, 53 N. W. 1008. A creditor may sue on a judgment as soon as it is rendered: *Morse v. Pearl*, 67 N. H. 317, 68 Am. St. Rep. 672, 30 Atl. 255.

SAN ANTONIO REAL ESTATE BUILDING AND LOAN ASSOCIATION v. STEWART.

[94 Tex. 441, 61 S. W. 386.]

LIMITATION OF ACTIONS—INSTALLMENT NOTES.—A provision in a contract that on default in the payment of one or more of a series of installment notes those remaining unpaid shall become due and payable operates to mature the entire debt and to set the statute of limitations running against all upon such default, and not merely to give the creditor an option whether or not he will then treat the whole debt as due. (p. 866.)

LIMITATION OF ACTIONS.—The fact that the party invoking the statute of limitations may have put it in motion by his own wrong is no obstacle to its operation. (p. 867.)

LIMITATION OF ACTIONS—MATURITY OF DEBT—NEW AGREEMENT.—If a contract provides that on default in the payment of one of several notes the remaining unpaid notes shall become due, the statute of limitations begins to run against the entire debt upon such default, and the creditor cannot by his act alone change that effect, but the parties may by mutual agreement change the effect of the default and treat the contract as if no default had been made. The surrender by the debtor of his right to discharge the whole debt at once and his securing further credit is consideration from each party for such agreement. (p. 869.)

ESTOPPEL BY WAIVER.—If each party to a contract so acts as to justify the other in believing, and acting on the belief, that the effect of the failure to pay part of a debt when due is to be disregarded and the contract to stand as if there had been no default, a mutual estoppel by waiver as to the effect of such default is created. (p. 869.)

LIMITATION OF ACTIONS—NEW PROMISE—ORAL AGREEMENT.—A statute requiring a new acknowledgment of a debt to be in writing to take the case out of the operation of the statute of limitations does not apply to a parol agreement waiving the effect of a default in the payment of part of debt as maturing

the whole debt. The effect of such waiver is to take away the right to sue until the new maturity of the debt, while the statute applies only to a cause of action against which it runs, because of its maturity. (p. 870.)

Onion & Henry, for the appellant.

Denman, Franklin & McGinn, for the appellee.

⁴⁴³ WILLIAMS, A. J. The statement and question below are certified for decision by the court of civil appeals for the fourth district:

"On August 19, 1892, Solon Stewart and his wife, Georgia C. Stewart, desiring to build a home in the city of San Antonio, entered into a contract with the San Antonio Real Estate, Building, and Loan Association to obtain the sum of two thousand three hundred and seventy-six dollars with which to erect a home, and at the same time executed and delivered to said association seventy-two promissory ⁴⁴⁴ notes payable in monthly installments, including interest from date up to September 1, 1898, and at the same time made, executed, and delivered to said association a builder's and mechanic's lien in writing properly acknowledged so as to bind the homestead, and in that lien which is referred to in each of the notes, it was provided 'that whenever any three of said notes or monthly payments remain unpaid, in whole or in part after due, then and thereupon the balance of said notes remaining shall be due and payable, and said association may at any time thereafter proceed to foreclose said debt and lien.' The money was used to erect a home for Stewart and wife. Stewart defaulted in payment of the notes that became due in January, February, and March, 1894, and paid nothing on any of the notes due in 1894 until October of that year, when he paid the January note; and in December paid the February note and afterward the March note of 1894. On the first days of April, May, June, July, August, September, October, November, and December, 1894, and January, February and March, 1895, and at various times for many months thereafter, the representative of the association saw Stewart and urged him to pay the notes that were past due, and each time Stewart begged for further time, verbally promising to pay the notes. Further time was granted by the association and Stewart paid off at different times twenty-nine of the seventy-two notes, among the number being the three notes due respectively in January, February, and March, 1894. Both parties acted in connection

with the notes as though no default had taken place by reason of failure to pay the installments due for the first three months of 1894. Payment was never refused by Stewart until just before the suit was instituted. On March 1, 1900, more than four years after default had been made in the payment of the three notes due in January, February, and March, 1894, but at a time when none of the remaining unpaid notes were barred by limitation on their faces, this suit was instituted and Stewart interposed a plea of four years' limitations on the ground that all the notes became due in March, 1894, which plea was sustained by the court.

"Question. Did all the unpaid notes become due upon default in the payment of the three notes in such manner that the statute of limitations has barred appellant, regardless of what took place, as hereinbefore stated, between Stewart, and the association in reference to the contract?"

The notes and the instrument creating the lien, executed at the same time concerning the same subject matter, are to be construed together as constituting one contract. According to the great weight of authority, including decisions of this court, the stipulation in the last-mentioned writing has the effect of fixing a contingency upon the happening of which the debt should mature at a time earlier than the dates given in the notes for their maturity: *Dodge v. Signor*, 18 Tex. Civ. App. 45, 44 S. W. 926; *First Nat. Bank v. Peck*, 8 Kan. 660; *Wheeler etc. Mfg. Co. v. Howard*, 28 Fed. 741; *Brownlee v. Arnold*, 60 Mo. 79; 1 *Daniel on Negotiable Instruments*, sec. 445 156; *Gregory v. Marks*, 8 Biss. 44, Fed. Cas. No. 5802; *Noell v. Gaines*, 68 Mo. 649. There is some authority for the construction that such a stipulation in the mortgage alone does not have the effect, upon default in the payment of an installment, of maturing the notes for general purposes, but operates only to allow foreclosure of the mortgage and the application of the proceeds of the property to the whole debt without otherwise affecting the terms of credit expressed in the notes: *Owings v. Mackenzie*, 133 Mo. 323, 33 S. W. 802; dissenting opinion of Hough, J., in *Noell v. Gaines*, 68 Mo. 649, and cases cited. This view cannot be adopted consistently with the previous decisions of this court or the current of decisions elsewhere, of which many others could be cited besides those before referred to; and the effect of the stipulation in question in the instrument giving the lien must be held to be the same as if it had been inserted in the notes.

Among the courts so treating it, another difference of opinion has arisen as to its effect, some treating it as maturing the notes absolutely, upon default in payment of one of the installments, and others holding that it merely gives to the creditor a right of election to declare the whole debt to be due or to waive the default, and insist upon the performance of the contract as it originally stood unaffected by such default.

The view first stated has been adopted by this court, with the result that upon default in an installment the debt matures and limitation begins to run: *Harrison Machine Works v. Reigor*, 64 Tex. 91; *Dodge v. Signor*, 18 Tex. Civ. App. 45, 44 S. W. 926. Other authorities to the same effect are *Hemp v. Garland*, 4 Q. B. 519, 45 Eng. Com. L. 519; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; *First Nat. Bank v. Peck*, 8 Kan. 660. It was insisted at the argument that these decisions were not well considered and that the proposition that such provisions merely give to the creditor the option of declaring the debt due upon default in an installment is supported by the weight of authority and by the better reason. We have given the question a careful re-examination, and, as a result, are unable to say either that it did not receive proper attention in the cases previously before this court, or that the decisions are so clearly wrong or against the preponderance of authority as to justify us, if we were inclined to a different conclusion, to overrule them. They have, to say the least, the merit of giving to the unqualified provision that default shall mature the debt its exact meaning, while the opposite view qualifies it by an intention arrived at by construction that something else, viz., the option of the creditor, shall be essential to such maturity. Provisions in such contracts sometimes expressly give the option to the creditor and sometimes assume the form used in the present case. The authorities relied on by appellant give precisely the same effect to these differing provisions, which is, at least, a questionable liberty taken with the language in which the parties have expressed their intention.

Most of the authorities advancing this doctrine regard the provision as being in the nature of a penalty or forfeiture of which the party to whom it may accrue is not bound to take advantage: *Belloc v. Davis*, 38 Cal. 242; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561; *Watts v. Creighton*, 85 Iowa, 154,

52 N. W. 12; *Leavitt v. Reynolds*, 79 Iowa, 348, 44 N. W. 567; *Nebraska City Bank v. Nebraska etc. Co.*, 14 Fed. 764; *Smalley v. Renken*, 85 Iowa, 612, 52 N. W. 507; *California Sav. etc. Co. v. Culver*, 127 Cal. 107, 59 Pac. 292; *Bell v. Romaine*, 30 N. J. Eq. 23; *Sire v. Wightman*, 25 N. J. Eq. 102. If this proposition is essential to the conclusion stated, those decisions are not to be sustained upon principle and are opposed to the overwhelming weight of authority, by which such provisions are held to be neither penalties nor forfeitures, but simply as providing contingencies, upon the happening of which the debt is to mature earlier than it otherwise would: 1 *Pomeroy's Equity Jurisprudence*, 439, and cases cited; *Bona-fous v. Rybot*, 3 Burr. 1370.

But a reason more difficult to meet is found in the stipulations in the contract itself. The debtor promises to make his payments in installments at stipulated times, and thereby gives to the creditor the benefit of an interest-bearing investment for the period agreed upon; and it may be said that this shows the intention of the parties that he should not have the right to violate this promise by breaking another—to pay each installment at maturity—and thereby secure the right to pay all before the times agreed upon; in other words, that the intention is apparent that he should not have the right to mature the debt, because he has promised to do the things which would prevent it from maturing, and that hence it was contemplated that only the creditor should have such right.

The question now before us is one of limitation, and we need not determine whether or not, under the view taken in this state, the debtor, by his willful default, could secure a right to pay the whole debt before he had agreed to pay it without the creditor's consent. The fact that the party invoking limitation may have put it in motion by his wrong is no obstacle to but is usually the occasion of its operation. Besides, it is not necessary to assume that the parties to such a contract intended to provide for none but wrongful refusals to pay installments. It might happen that the debtor upon good grounds would afterward deny his liability upon the contract and therefore refuse to pay installments, in which case the provision would serve him a useful purpose in bringing the question at issue to a prompt test and not leave it entirely with the creditor to delay until perhaps evidence of the defense had been lost. The question at last is one of con-

struction of the language used, and that which makes it mean just what it says is not without reason or good authority to support it. Where the purpose is only to give the option to the creditor, language expressive of it may be easily inserted.

It follows that when, upon default in the payment of the first installment, the whole debt matured according to the terms of the contract, the cause of action upon it accrued and limitation began and ⁴⁴⁷ continued to run, unless the transactions between the parties changed their rights as they existed after the default was made.

Authorities holding that by acceptance of payment of overdue installments, or extension of time upon an installment and other like acts, the creditor waives the default, are relied upon, but those are decisions in which the contract is regarded as only giving to the creditor the right of election. When the proposition is established that the failure to pay an installment ipso facto gives rise to the cause of action upon the whole debt, it necessarily follows that mere delay in suing, or acceptance of part of what is due, or other act of the creditor alone will not take away his right to sue. And if that right continues, limitation runs against it.

It is not in the power of the creditor by his acts alone to change the rights of the parties resulting from the maturity of the debt. But both parties, by their joint action, may so alter such rights that the creditor would no longer have the right to demand nor the debtor to pay the entire indebtedness. If it be true that, in a contract like this, where the installments are payable at given dates and the debtor has not the right before default to pay at any other times, such debtor acquires the right, after default, to pay all of the debt at once (a question which we need not now decide), any agreement the parties might make which would have the effect of obviating the default and restoring the contract to its original condition as if it had not been broken, would be supported by a sufficient consideration. The debtor would secure from the creditor further credit and give up his right to discharge the whole liability at once: *Benson v. Phipps*, 87 Tex. 578, 47 Am. St. Rep. 128, 29 S. W. 1061; *Austin etc. Abstract Co. v. Bahn*, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430. But aside from this, while neither party by his separate action or nonaction could impair the rights of the other, each could waive his own rights as they accrued from the default in payment of an installment so as to estop him from relying upon such de-

fault. To accomplish this, it would only be necessary that each should so act as to justify the other in believing, and acting upon the belief, that the effect of the failure to pay an installment was to be disregarded and that the contract should stand as if there had been no default. The principle of estoppel by waiver would, we think, have proper application in such a case: Bishop on Contracts, secs. 789-808; Bigelow on Estoppel, 63 et seq.; Merchants' Mut. Ins. Co. v. Lacroix, 45 Tex. 158; St. Paul Fire etc. Ins. Co. v. McGregor, 63 Tex. 404. An agreement or waiver having the effect supposed may be inferred from the conduct and declarations of the parties as well as evidenced by their express stipulations.

Counsel for appellee rely upon the doctrines and distinctions illustrated by the decisions in the cases of Austin etc. Abstract Co. v. Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430, and Benson v. Phipps, 87 Tex. 578, 47 Am. St. Rep. 128, 29 S. W. 1061, and contend that an agreement or waiver such as that we have instanced, would not be good because it did not bind the creditor to forbear and the debtor not to pay for any given time. The distinction is in this: The contract ⁴⁴⁸ was in writing, fixing times and terms of credit, which were affected only by the default causing maturity earlier than such dates. It was therefore only necessary to take away the effect of the default and to restore the contract as it was before that occurred, when its terms would be perfectly definite and certain.

The statute which provides that "No acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law (of limitation) unless such acknowledgment be in writing and signed by the party to be charged thereby," does not control the question before us. The acknowledgment referred to in the statute is one which is to take the case out of the statute of limitation, and is therefore one made of a cause of action against which the statute runs. Where there is no cause of action, no right to sue, no limitation can run, and no acknowledgment is needed to take it out of the operation of the law. The effect of such an agreement or waiver as we have supposed is to take away the right to sue, and until the debt should mature under it, there would be no cause of action.

The language, "Acknowledgment of the justness of the claim," had a well-defined meaning in the law of limitations

before such statutes as this were passed, and the provision was intended to require them to be in writing where before they could have been oral, and not to restrict the power of parties to contract generally. The purpose was only to require those things which had become known as acknowledgments of claims to be in writing.

That there was such an agreement or waiver as we have supposed is not definitely stated in the certificate, but evidence is recited which tends to show it. Whether or not it existed is to be drawn as an inference of fact from all of the evidence, and this inference cannot be drawn by this court as a matter of law. We therefore can only answer that while all of the notes became due upon default in payment of the first, we cannot say as matter of law that the notes were barred when suit was brought. Whether they were or not depends upon facts to be found from the evidence.

Limitations.—Though the holder of a note has exercised his option of considering the whole amount due for nonpayment of interest, he may subsequently waive the right; and if he does so, the statute of limitations does not begin to run against him prior to the date originally fixed for the maturity of the note: *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166, 65 Pac. 624.

COLEMAN v. FIRST NATIONAL BANK.

[94 Tex. 605, 63 S. W. 867.]

BANKS AND BANKING—HUSBAND'S MANAGEMENT OF WIFE'S MONEY.—If a husband has deposited his wife's money in bank in her name with the understanding that he will draw it out by checks, the bank is authorized to pay it upon checks drawn by him. (p. 872.)

BANKS AND BANKING—HUSBAND'S RIGHT TO DEPOSIT AND CHECK OUT WIFE'S MONEY.—If a husband is given the sole management of his wife's separate estate, he may deposit her money in bank in her name and draw it by checks signed in her name by him, and the bank need not ascertain that the money is being drawn for her use simply because the husband is intemperate or improvident. (p. 872.)

Seay & Seay, for the appellant.

Templeton & Harding, for the appellee.

605 GAINES, C. J. This suit was brought by the plaintiff in error, a widow, to recover of defendant in error certain

to presume that the trustee is in the course of law fully performing his duty, and to honor them accordingly." This language was quoted with approval and the principal applied in the case of *State Nat. Bank v. Reilly*, 124 Ill. 464, 14 N. E. 657. Again, in *Freeholders of Essex v. Newark City Nat. Bank*, 48 N. J. Eq. 53, 21 Atl. 185, the court say: "The contract arising by implication of law from a deposit of money in a bank is, that the bank will, whenever required, pay out the money in such sums and to such person as the depositor shall designate by his checks. The deposit is made to subserve the convenience of the depositor, with the understanding that he shall have the right to draw checks against it at his pleasure. And even when it is known that the money deposited is held by the depositor as a trustee, the bank is bound to presume, in the absence of knowledge to the contrary, that a check drawn against the money by the depositor has been drawn by him in the proper discharge of his duty as trustee, and to pay the check accordingly": Citing *State Nat. Bank v. Reilly*, 124 Ill. 464, 14 N. E. 657. In a similar case the supreme court of Georgia says: "When money is deposited in a bank, it is immaterial, so far as the bank is concerned, in what capacity the depositor holds or owns it. The obligation of the bank is simply to keep it safely and return it to the proper person. Therefore, when a trustee deposits money in a bank to his credit as agent, the bank would be discharged by paying back to the individual who made the deposit, and, in the absence of knowledge or notice to the contrary, would have the right to assume that he would appropriate the money to its proper uses and trusts. If this individual should go in person to the bank and demand the money, it cannot be doubted that the latter could and ought to hand it to him. . . . It appearing from what has already been said that the person who actually puts money in bank is entitled to have it back upon demand, and that it is immaterial how he describes himself, there can be no doubt that a check drawn by such person as agent and presented by the payee is a sufficient demand for the amount of money called for by the check, especially when the money was credited to the depositor as agent. . . If payment of such ⁶⁰⁸ check be refused, the depositor may bring suit, and, as already shown, the suit may be maintained by him described as trustee": *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554. The principle is that since the trustee has control of the money and has deposited it in the

bank to be drawn out upon his checks, he has the right to draw for it, and the bank is not permitted to deny that right. When the beneficiary asserts his claim and gives the bank notice, the rule does not apply. In the New Jersey case just cited, the general rule was followed even as to the custodian of public funds.

The principle does not allow the bank to collude with the depositor in a misapplication of the trust fund; nor does it permit the bank to apply the fund to the individual debt due to it from the trustee: *Commercial etc. Bank v. Jones*, 18 Tex. 811. If such be the rule as to ordinary agents and trustees, it certainly is the rule in this state as to the husband with respect to the wife's separate funds, of which, under our law, he has the "sole management." If the money had been deposited by the wife before her marriage and the fund had remained in custody of the bank after that event, it would seem that he, as sole manager of her separate estate, and he alone, would have had the right to withdraw it. Clearly, therefore, having himself made the deposit with the understanding that it was to be drawn out upon his checks, the bank was bound to honor the checks so drawn. It was not charged with the duty of inquiring into the purpose for which each check was given. The fact that the husband was improvident in the use of money did not, under the law, detract from his authority as manager of his wife's separate estate, nor did it impose upon the bank an additional duty to guard her interest. The plaintiff, by entering into the marriage relation with her husband, made him the sole agent for the management of her separate estate, and the rule announced by Judge Lipscomb in *Kesler v. Zimmerschitte*, 1 Tex. 50, "that he who trusts most, where one of two innocent persons is to suffer, shall lose most," applies; and the defendant did not have to see that the money was being drawn out for her use before it paid his checks.

The opinion of the court of civil appeals upon the first appeal of this case, as reported in *Coleman v. First Nat. Bank*, 17 Tex. Civ. App. 132, 43 S. W. 938, very clearly and ably presents the views expressed in this opinion. The cause was then remanded to be tried in accordance with the rulings made in that opinion. Upon the second trial of the case, the rulings of the court of civil appeals were followed.

We find no error in the proceedings which calls for a reversal of the judgment, and therefore the judgment and that of the court of civil appeals are affirmed.

Bank Deposits.—Where money is deposited in a bank by a person as agent, with nothing upon the face of the account to show for whom he is agent, the money, as between the bank and the depositor, is the property of the latter: *Patterson v. Marine Nat. Bank*, 180 Pa. St. 419, 17 Am. St. Rep. 778, 18 Atl. 632. And when a trustee deposits money in a bank to his credit as agent, the bank is discharged by paying it back to the person who made the deposit: *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

POSTAL TELEGRAPH CO. v. CITY OF RICHMOND.

[99 Va. 102, 37 S. E. 789.]

INTERSTATE COMMERCE—TAXATION.—TELEGRAPH COMPANIES are instruments of commerce. While their property within a state may be taxed by the state as other property is taxed, yet their interstate business cannot be. (p. 880.)

INTERSTATE COMMERCE.—A CITY MAY IMPOSE A LICENSE FEE upon a telegraph company or agency for business done exclusively therein, not including interstate business or business for the government. (p. 880.)

INTERSTATE COMMERCE.—A CITY MAY IMPOSE A LICENSE TAX upon an agency of interstate commerce, such as a telegraph company, provided the tax is not in excess of that to which the property of the company within the jurisdiction of the city would be subject under the ordinary modes of taxation. (p. 881.)

INTERSTATE COMMERCE.—A CITY CANNOT LEVY A LICENSE TAX on a telegraph company, doing interstate business, in excess of what an ad valorem tax on its property within the city would be. Nor can it make the payment of this tax a condition precedent to the right to transact business. (p. 882.)

J. R. McIntosh, for the plaintiff in error.

Henry R. Pollard, for the defendant in error.

103 KEITH, P. This is a writ of error to a judgment of the hustings court of the city of Richmond imposing a fine of two hundred and seventy dollars upon the Postal Telegraph Cable Company for prosecuting its business as a telegraph company in the city of Richmond without first having paid a specific license tax of twenty dollars assessed against it in accordance with an ordinance of the said city.

Upon the trial of the cause in the hustings court the facts were agreed as follows:

"1. That the defendant, Postal Telegraph Cable Company, is a corporation incorporated under the laws of the state of New York, and prior to the assessment of the license taxes, for the nonpayment of which it is being prosecuted by the city of Richmond, by these proceedings, it had duly accepted of the provisions of the act of Congress approved July 24, 1866, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for military purposes,' as required by section 5268 of the Revised Statutes of the United States.

"2. That the defendant company, under and by virtue of an act approved March 6, 1890, as amended by the act of March 3, 1898 (Acts 1897-98, p. 752), was required, on or before the first day of June of each year, to make report, verified by oath, to the auditor of public accounts, of all real and personal property owned by said company, as of the 1st of February, showing what part of said property is located in each county or corporation and classifying the same, etc.

"That such report was duly made to the auditor of public accounts for the year 1898, showing the aggregate value of the defendant's property in the state of Virginia to be \$49,334.49, and the aggregate value of its property located in the city of ¹⁰⁴ Richmond to be two thousand seven hundred and eight dollars and forty-five cents, and on this report, so required to be made, an ad valorem tax of forty cents on every hundred dollars' worth of property owned by said company in the state was assessed for state taxes, and by the said company paid. The defendant company was also assessed with a privilege tax to the state of one thousand dollars, and an additional charge of one per centum of the gross earnings the company received, or due, though not received, from their business in this state during the year preceding; provided, that the gross receipts of such company were less than one thousand dollars, but which said privilege tax the defendant company has never paid; and each county and municipality in the state in which such company has property may impose an ad valorem tax upon the assessed value of the same as assessed by the state; and that the city of Richmond, by virtue of section 10 of chapter 88 of the city code (1899), imposes a fee of two dollars upon each telegraph pole as rental for each pole owned by the defendant, located in any of the parks,

streets, lanes, or alleys of the city of Richmond, and also a license tax of two hundred dollars per annum for the non-payment of which license tax this prosecution is maintained, which the ordinance required to be paid before the defendant can do business in the city of Richmond, which license tax of two hundred dollars is intended to be in lieu of a property tax upon the property of the defendant company, located in the city of Richmond, which property tax the city might have assessed on the property of the defendant company, so located in the city of Richmond, but which said property tax the city has never assessed on the property of the defendant company, so located in the city of Richmond.

"3. That the wires of the defendant telegraph company in the state of Virginia connect with other wires in other states, and telegraph messages are transmitted thereon into and through every state, and all of the principal towns and cities therein, ¹⁰⁵ also connect with cables under and across the Atlantic ocean, and that said company is engaged in interstate commerce.

"4. That the gross receipts of the defendant telegraph company, for all business done within the city of Richmond, as well interstate as extrastate, are at least five thousand dollars per annum less than the amount paid out per annum to its employes in said city, and for the maintenance of its lines.

"5. That the population of the city of Richmond, according to the census of 1890, was eighty-one thousand three hundred and eighty-eight.

"6. The charter of the city of Richmond and the ordinances thereof may be read in evidence on the trial of the case, or in any court to which the case may be appealed, as if the same were here set out in full."

In addition to the agreed facts, it was shown by the testimony of witnesses that the Postal Telegraph Company was so classified under the provisions of the city ordinances as to require the payment by it of a license tax of two hundred dollars; that the value of its property within the limits of the city was about two thousand seven hundred and eight dollars; and that an ad valorem tax upon that sum under the city's ordinances would be somewhat less than forty dollars per year; that the ad valorem tax for 1898 was tendered to the collector of revenue, who refused to receive it, saying that there was no assessment of such a tax against the company.

This being all the evidence, the following instruction was asked by the city, and given to the jury by the court: "If the jury believe from the evidence that the Postal Telegraph Cable Company had a place of business in the city of Richmond at the time of the assessment of the tax against it for the year 1898, and that the committee on finance classified and assessed it for said year, 1898, with a tax of two hundred dollars, and that said tax was in lieu of taxes which might have been levied directly upon its property located in the city of Richmond, and if they further believe that said company prosecuted its business after ¹⁰⁶ the first day of May of that year to the end of the fiscal year, without having paid said tax, then they should find the said company guilty, and assess a fine against it of not less than one dollar, nor more than five dollars, for each day's default thereafter from the first day of May, 1898, to the first day of February, 1899."

The following instructions were asked by the Postal Telegraph Company, and refused by the court:

"The court instructs the jury that the prosecution of this case is against the defendant by the city of Richmond for the failure to pay a privilege tax imposed by said city, and that the defendant is a foreign corporation engaged in interstate commerce, and in transmitting messages for the government of the United States, with the right to exercise its franchise within the state of Virginia, and that such tax is unconstitutional and void, unless the jury believe from the evidence that the license tax so imposed is in lieu of all other taxes imposed by the city of Richmond upon the said defendant, and not more than the sum which the defendant company would have had to pay if its property had been subjected to the ordinary ad valorem property tax provided for in the statutes of one dollar and forty cents on the one hundred dollars.

"If the jury believe from the written agreement of counsel for the city of Richmond and the defendant company filed in this cause that the privilege tax imposed by the said city upon the defendant had to be paid before the company could do business in the state, then they will find for the defendant."

In its petition, there are several errors assigned, but we need only consider those which relate to the instructions given and refused by the hustings court.

It is settled law that "the telegraph is an instrument of commerce, and telegraph companies are subject to the regulating ¹⁰⁷ power of Congress in respect to their foreign and

interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits": *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

"A general license tax on a telegraph company affects its entire business, interstate as well as domestic or internal, and is unconstitutional." While the property of a telegraph company, situated within a state, may be taxed by the state as all other property is taxed, yet its business of an interstate character cannot be thus taxed: *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380.

A city may impose a license fee upon every telegraph company, or agency, doing business in the city, for business done exclusively in the city, not including business done to and from points without the state, or business done for the government, its officers or agents: *Postal Tel. Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. Rep. 1094.

It appears from the facts agreed that the plaintiff in error has accepted the conditions imposed upon it, and is entitled to all the privileges conferred by the act of Congress of 1866 (section 5268 of the Revised Statutes of the United States); that it is doing in the city of Richmond a business which consists in part at least of sending and receiving messages to and from points beyond the limits of the state, and the cases cited decide that the ordinances of a city which impose a license tax upon a telegraph company so engaged is unconstitutional. The instruction asked for by the city and given by the court seeks to obviate the difficulty by stating to the jury that if the license tax assessed against the telegraph company "was in lieu of taxes which might ¹⁰⁸ have been levied directly upon its property located in the city of Richmond, and if they further believe that said company prosecuted its business after the first day of May of that year to the end of the fiscal year, without having paid said tax, then they should find the company guilty."

The instruction asked for by the plaintiff in error upon that feature of the case tells the jury that a license tax "is uncon-

stitutional and void, unless they believe from the evidence that the license tax so imposed is in lieu of all other taxes imposed by the city of Richmond upon the said defendant, and not more than the sum which the defendant company would have had to pay if its property had been subjected to the ordinary ad valorem property tax provided for in the statutes of one dollar and forty cents on the one hundred dollars."

The position taken in the instruction asked for by the city would, if sound, render of no effect the principle enunciated in the decisions just cited, for if the vice in the law which imposes a license may be cured by the recital that it is in lieu of all other taxes without regard to the proportion which the amount levied as a license bears to that which would be paid as an ad valorem tax upon property, it is obvious that all limitation upon the power of the city is destroyed, and the whole subject is left at large to its discretion. The rule is, that a city cannot levy a license tax upon interstate commerce, or upon any of the agencies necessary to the transaction of interstate commerce. The exception is, and a most reasonable one, that a license may be levied upon an agency of interstate commerce, as for example, a telegraph company, provided always the license tax be not in excess of that to which the property of the telegraph company within the jurisdiction of the city would be subject under the ordinary modes of taxation. This clearly appears in the case of *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. Rep. 268, where the chief justice, speaking for the supreme court, says: "It is settled that where by way of duties laid on the transportation of ¹⁰⁰ the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent, to the right to carry on the business, but its enforcement left to the

ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

In the case just cited, it plainly appears that the sum exacted in the form of a license tax was less in amount than an ordinary tax upon the property of the telegraph company would have been, and it was for that reason sustained. In the case before us, the license tax imposed is two hundred dollars per year; while a tax levied *ad valorem* would, by the uncontradicted evidence, amount to less than forty dollars per year. It cannot be said that the license tax amounts "to no more than the ordinary tax upon the property, or a just equivalent therefor." The payment of this license tax was made a condition precedent to the right to transact business, and in this respect also the ordinance under consideration is invalid upon the authority of the case as cited.

The defendant in error relies upon *Western Union Tel. Co. v. Richmond*, 26 Gratt. 1. It was decided in 1875, and ¹¹⁰ is in conflict with the more recent decisions of the supreme court, which are binding authorities upon us in all causes arising under the constitution and laws of the United States.

We are of opinion that the judgment of the hustings court should be reversed.

Interstate Commerce.—Telegraph Companies are instruments of commerce, and their business is commerce itself: See the monographic note to *People v. Wemple*, 27 Am. St. Rep. 559, on state regulations of interstate commerce. A state tax on the business of a telegraph company engaged in interstate commerce is ordinarily invalid: *Commonwealth v. Smith*, 92 Ky. 38, 36 Am. St. Rep. 578, 17 S. W. 187. Though a privilege tax imposed in lieu of all other taxes, its amount being graduated according to the amount and value of the property measured by miles, if reasonable in amount, and especially if less than the *ad valorem* state tax, is not an interference with interstate commerce and is valid: *Postal Tel. Co. v. Adams*, 71 Miss. 555, 42 Am. St. Rep. 476, 14 South. 36. For recent cases involving license taxes on carriers, see *Pullman Co. v. Adams*, 78 Miss. 814, 84 Am. St. Rep. 647, 30 South. 757; *St. Louis v. Consolidated Coal Co.*, 158 Mo. 342, 81 Am. St. Rep. 310, 59 S. W. 103.

SANDS v. DURHAM.

[99 Va. 283, 38 S. E. 145.]

THE DOCTRINE OF SUBROGATION IS INDEPENDENT of contractual relations, and involves the principle that if one secondarily liable has paid the debt of another primarily liable therefor, he will, in equity, be substituted to the rights and remedies of the creditor against the party whose liability he has been compelled to discharge. (p. 884.)

THE DOCTRINE OF SUBROGATION COVERS every instance in which one party has been required to pay a debt for which another is primarily answerable, and which in equity and good conscience ought to be discharged by the latter. (p. 885.)

SUBROGATION.—A PARTNER, WHO HAS PAID JUDGMENTS for firm debts recovered against the members of the firm after its dissolution and the exhaustion of its social assets, is entitled to be subrogated to the rights of the judgment creditors against the real estate of his copartner, in the hands of a subsequent purchaser, to the extent his payments exceed his proportion of the liability. (pp. 884, 889.)

Suit by J. H. Durham, the appellee, for a settlement of the partnership accounts of D. L. Whittaker & Co., and to be subrogated to the rights of certain judgment creditors of the firm. The partnership had been dissolved, and Durham, as one of its members, settled its affairs. In doing so, he exhausted the firm assets, and, in addition, paid a large number of debts, some of which had been reduced to judgment, out of his individual means. After the rendition and docketing of these judgments, D. A. Early, another member of the firm, conveyed his interest in certain real estate to Ann Jane Sands, the appellant. From a decree that Durham was entitled to be subrogated to the rights of the judgment creditors, and to subject the real estate conveyed by Early to the satisfaction of the judgments, this appeal was taken.

J. C. Wysor, for the appellants.

Henson & Mason and S. W. Williams, for the appellee.

286 WHITTLE, J. An opinion was handed down in this case in June, 1900 (Sands v. Durham, 98 Va. 392), but, this court not being satisfied with the conclusion then reached, a rehearing was granted.

There is but this single question presented for decision: Where a partnership has been dissolved, and the social assets

exhausted, and judgments subsequently recovered against the members of the firm on partnership debts have been paid by one of the partners, who is not in arrears to the firm, out of his individual means, and this is shown by a settlement of the partnership accounts, is the partner who has paid the judgments entitled to be subrogated to the rights of the creditors whose judgments he has satisfied against the real estate of his copartner, in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional part of the liability?

The doctrine of subrogation is independent of any mere contractual relations existing between the parties to be affected by it, and involves the equitable principle that where one who is secondarily liable has paid the debt of another, who is primarily liable therefor, he will, in equity, be substituted to all the rights and remedies of the creditor against the party whose share of the joint liability he has been compelled to discharge. Sheldon, in his work on Subrogation, states the doctrine thus: "The usual rule is that one of several joint debtors will, as against his codebtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his codebtors, by ²⁶⁷ means thereof, their proportional shares of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as a principal debtor for that part of the debt which he ought to pay, and as surety for his codebtors as to the part of the debt which ought to be discharged by them": Sheldon on Subrogation, sec. 169; citing *Morrow v. Peyton*, 8 Leigh, 54; *Boyd v. Boyd*, 3 Gratt. 113.

Subrogation has been denominated as one of the benevolences of the law, created, fostered, and enforced in the interest and for the promotion of justice.

In England, and in a few of the states of the Union which have adopted the English rule, the application of the doctrine is very much restricted. Indeed, prior to an act of parliament (19 & 20 Vict., c. 97) the courts had held that even a surety who satisfied a judgment against himself and his principal was not entitled to be subrogated to the rights of the creditor, and to have the judgment kept alive for his benefit (*Copis v. Middleton*, 1 Turn. & R. 229; *Hodgson v. Shaw*, 3 Mylne & K. 190), but by the act of parliament aforesaid the doctrine was extended to sureties.

With the exception of the courts of Alabama, Vermont and North Carolina, the English rule has not been followed in this country.

In most of the other states it has been extended until, in its practical application, it has been deemed broad enough to cover every instance in which one party has been required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter.

In no other jurisdiction has the doctrine been more firmly adhered to or more liberally expounded and applied, to meet the exigencies of particular cases, than in Virginia.

In *Powell v. White*, 11 Leigh, 309, this court expressly repudiated the doctrine of *Copis v. Middleton*, 1 Turn. & R. 229, and *Jones v. Davids*, 4 Russ. 277. In a review of these cases found in a note ²⁶⁸ to *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq., pt. 1, 140, it was remarked: "In the more recent case of *Powell v. White*, 11 Leigh, 309, the decisions in *Copis v. Middleton*, 1 Turn. & R. 229, and *Jones v. Davids*, 4 Russ. 277, were thoroughly examined in the court of appeals, and the Virginia practice was vindicated against the authority of Lord Eldon, with distinguished and convincing ability."

This court said, in *Enders v. Brune*, 4 Rand. 447: "It has nothing of form, nothing of technicality, about it; and he who in administering it would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object."

In *Tompkins v. Mitchell*, 2 Rand. 428, it was enforced in behalf of the principal debtor against a codebtor, where the former had paid more than his proportion of the debt, by substituting him to the rights of the creditor whose vendor's lien he had discharged, the court holding that, as between themselves, each was a principal debtor for his one-half of the debt, and the one paying more than one-half was surety as to the excess paid by him.

In *Wheatly v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654, the parties were partners. The original debt was a joint obligation, but not a partnership debt. Subsequently the firm made its notes therefor and secured them by a lien on the property for which the debt was created. Afterward one of the part-

ners paid the entire debt, and he was subrogated to the lien of the creditor whose debt he had satisfied.

In *Gatewood v. Gatewood*, 75 Va. 415, it was declared that subrogation would be enforced in favor of sureties and others who are required to pay in order to protect their own interest.

In *Dobyns v. Rawley*, 76 Va. 537, the consideration of real estate sold and conveyed by Fulton to Rawley and Davis jointly, was five thousand dollars, for the payment of which they executed their joint bonds. In a subsequent division of the land between the purchasers, Rawley's parcel was rated at three thousand dollars and Davis' at two thousand four hundred dollars, and in this proportion they were to discharge their joint ²⁶⁹ indebtedness to Fulton. It was held that the legal effect of the arrangement was that, as between the two purchasers and in relation to each other, they were principal debtors for their respective portions of the purchase money, and each was surety for the other's portion, and that, if either paid more than his agreed share, he became entitled to all the rights and remedies of a surety—to subrogation among the rest—against the other for repayment of such excess.

This principle was recognized in *Horton v. Bond*, 28 Gratt. 825, as the true ground for substitution to enforce contribution among cosureties. It was there said: "Sureties are not only sureties for the principal debtor for the whole debt; but, as amongst themselves, each is surety for the other to the extent of the excess of the whole debt beyond his proportionate part thereof."

In *Pace v. Pace*, 95 Va. 792, 30 S. E. 361, it was held that the liabilities of a decedent's estate, and the rights of his creditors, are fixed by his death. If at that time a creditor has the right to prove a debt against a decedent's estate for which the decedent and another are bound as sureties, and subsequently the cosurety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one-half of the debt is paid, although the estate of the decedent will not pay his debts in full.

Buchanan v. Clark, 10 Gratt. 164, is relied on as sustaining the contention that subrogation does not obtain amongst partners. The facts of that case are as follows: K., B., and G., who had formed a partnership for the purchase and sale of cattle, executed a joint bond to C. Cattle were sold, and G. was supplied with money arising from the sales for the pur-

pose of paying the bond to C. and all other partnership debts. It was agreed that G. should be the principal, and K. and B. sureties only, for said debts. The bond was not paid, and C. recovered judgment thereon against K., B., and G. G. was insolvent, and K. and B. ²⁷⁰ satisfied the judgment. Subsequently to the recovery of said judgment G. sold certain real estate, and K. and B. filed a bill in equity against G. and his alienees, setting forth the foregoing facts, and praying that they might be subrogated to the rights of C. under the judgment. The court held that it was competent for K., B., and G. to contract that, as between themselves, G. should be principal and K. and B. his sureties; that as between themselves K. and B. were entitled to be subrogated to the lien of the judgment creditor; and that they were equally entitled against the purchasers from G., who did not show a better equity. The court said: "I do not think, therefore, that there is anything in the objection that the debt, when contracted, was a partnership debt, and that with respect to the creditor it retained its original character. As between themselves, they occupied the relation of principal and sureties."

It will be observed, the court was dealing with a case of "convention subrogation," and confined its decision to the case in hand without intimation as to whether the general doctrine of subrogation would or would not obtain among partners.

Bispham's Principles of Equity is also relied on to show that the doctrine does not apply to partners, and that author says (at section 337): "The right will not, however, exist between parties who are equally bound—as, for example, co-partners, co-obligors and co-contractors, except, of course, by virtue of special contract."

His statement is general, is not confined to copartners, but embraces all co-contractors. And, as has been seen from the authorities reviewed, it is not, without qualification, a correct exposition of the Virginia doctrine. Of course, so long as such parties remain equally bound, the right does not attach; but they cease to be equally bound when one obligor discharges an obligation resting upon himself and his co-obligor. Both are bound to the obligee; but inter se, each is primarily, not equally, liable, for his own share, and secondarily liable for the share of the ²⁷¹ other; and when he pays the share of such other, all the conditions essential for the application of the doctrine arise.

In *Baily v. Brownfield*, 20 Pa. St. 41, cited to sustain the text, there is an obiter to the effect that a partner who has paid a partnership debt cannot be substituted to the creditor's rights. But in that case there had been no settlement of partnership accounts; and there was nothing to show that the partner asserting the right of subrogation had paid more than his share. It was, therefore, properly denied.

In the later case of *Fessler v. Hickernell*, 82 Pa. St. 150, subrogation was denied one partner against another, for the reason that until there had been a settlement of partnership accounts there was no means of ascertaining whether any, and if any, what balance was due to the partner demanding subrogation. But the right of a partner, who had been shown by a settlement of partnership accounts to have paid more than his share, was conceded in that case.

In the still more recent case of *Akerman's Appeal*, 106 Pa. St. 1, subrogation was allowed between principal debtors, the court holding that they were principals, so far as their creditor was concerned; but each was surety as to the share of the other.

Thus it appears that the Pennsylvania cases do not sustain the general proposition laid down by *Bispham*, but are in accord with the decisions of this court.

In *Sells v. Hubbell*, 2 Johns. Ch. 394, Chancellor Kent said: "The debt of *Sells* was the debt of the copartnership of *Bedient & Hubbell*. It was the common equal debt of both partners, and the consideration for which it was created is presumed to have inured equally to the benefit of both, and the contribution ought to be equal. The estate of each partner ought to be charged with the debt in equal portions, provided their interests in the copartnership were equal, and their accounts as between each other were equal. This is the intentment, in the first instance; and it would be a thing almost of course for equity to ²⁷² allow the representatives of a deceased partner who had to pay the whole debt to be substituted in the place of the creditor, in order to recover, from the surviving partner, or his estate, a moiety of what they had paid. Nothing could stay this proceeding but the allegation of the surviving partner that he was the creditor partner, and that the estate of the deceased partner owed him a balance as much or more than it had been obliged to pay. This would render it necessary to take and state an account between the part-

ners, before this court could interfere, in any way, to enforce the claim for contribution."

In the case under consideration, the partnership had been dissolved, the social assets had been exhausted in the payment of partnership debts, and a settlement of the partnership accounts had been made, from which it appeared that the appellee, J. H. Durham, was in advance to the firm, and, with his individual means had paid the judgments against it. Under these circumstances, the circuit court was of opinion, and decreed, that appellee was entitled to be subrogated to the rights of the judgment creditors, whose liens he had discharged; and to subject the real estate owned by his copartner, D. A. Early, at the date of the recovery and docketing of said judgments, to their satisfaction.

This court is of opinion there is no error in said decree, and that it ought to be affirmed.

Subrogation.—If one person discharges an obligation which primarily rests upon another, he should be substituted to the place of the creditor in respect to the party primarily liable: *Regan v. New York etc. R. R. Co.*, 60 Conn. 124, 25 Am. St. Rep. 306, 22 Atl. 503. Subrogation is not founded on contract, but is a creation of equity existing solely for accomplishing the ends of substantial justice: *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31. It does not flow from any fixed rule of law: *Ocobock v. Baker*, 52 Neb. 447, 66 Am. St. Rep. 519, 72 N. W. 582. It is an equitable and not a legal right: *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524. The right was formerly limited to transactions between sureties, but this rule has been modified. It is now enforced for the protection of those who, by paying the debts of others, should in good conscience be substituted to the place of the original creditors: *Henser v. Sharman*, 89 Iowa, 355, 48 Am. St. Rep. 390, 56 N. W. 525. See, in this connection, *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374. That a partner may be subrogated to the rights of creditors whose debts against the firm he has paid, see the note to *Payne v. Matthews*, 29 Am. Dec. 740.

STATE BANK OF VIRGINIA v. DOMESTIC SEWING MACHINE COMPANY.

[99 Va. 411, 39 S. E. 141.]

THE CONTRACTS OF A RECEIVER, made with express or implied authority, cannot be annulled at the pleasure of the court. (p. 895.)

RECEIVERS—POWERS AND DUTIES OF ACTIVE AND PASSIVE.—The powers of active receivers, to whom are confided the management of going concerns, are necessarily much broader than the powers of passive receivers, who merely preserve the property, collect the assets, and report the fund to the court for distribution. (p. 896.)

NOVATION.—WHETHER A NEW SECURITY constitutes a novation of a prior indebtedness is a matter of intention, and the burden of proof rests upon him who asserts that there has been such novation to establish it. (p. 896.)

RECEIVERS—TRANSACTIONS WITH BANK.—Where a receiver hypothecates securities as collateral to protect notes discounted for him by a bank, such collaterals become the property of the bank; and if they are delivered to him to collect, the avails to be deposited to his credit in the bank as trustee, and he applies the collections to current expenses of the receivership, he should make restitution to the bank out of other funds. (p. 897.)

RECEIVERSHIP—PRIORITY OF CREDITORS.—A bank's demand against a concern in the hands of a receiver, in excess of notes it has discounted for him and which are protected by collaterals, evidenced by receiver's certificates, does not stand on a different footing from, nor is it entitled to precedence over, the claims of other creditors of the same class. (p. 897.)

Coke & Pickrell, for the appellant.

B. T. Crump, for the appellees.

412 WHITTLE, J. This is an appeal from a decree of the chancery court of the city of Richmond. The controversy is one for priority of claim between the State Bank of Virginia and the receiver of the Domestic Manufacturing Company, creditors of the Domestic Sewing Machine Company.

In 1893 the Domestic Sewing Machine Company became insolvent, and executed a deed of trust, or assignment, conveying all its property in its agency and place of business in the city of Richmond to Henry C. Jones, trustee, for the benefit of its creditors.

Thereupon, the trustee filed a bill in the chancery court to administer the trust, and in that cause a receiver was appointed and authorized to continue the business, so far as, in his judg-

ment, it might be necessary to speedily dispose of the assets and wind up the trust.

Subsequently he submitted an exhaustive report of his transactions to the court, from which it appeared that it was the opinion of the creditors that great loss and damage would result if the affairs of the company were closed at once, and recommending that the business be temporarily conducted by the receiver until a permanent organization or other final settlement could be effected.

⁴¹³ The receiver, conforming to this policy, and with the consent of the creditors, adopted the necessary measures to continue the business. He suggested, among other things, that authority be conferred upon him to have discounted from time to time, as the necessities of the receivership required, such negotiable paper then in his hands, or which might come into his hands, as he should consider it expedient to discount, and to arrange for its proper protection. The report and all acts of the receiver were approved and confirmed by the court, especially his action in changing the management from a passive to an active receivership, and looking to a temporary continuation of the business. To effectuate the new policy, the receiver was empowered to discount and protect such commercial paper as might come into his hands, and also to issue receiver's certificates, not to exceed \$40,000, payable at the State Bank of Virginia. These certificates were declared to be the first lien upon all the sewing machines and upon all other property in the store or warehouse of the company, or which the receiver might have in the conduct of his office, wheresoever the same might be, together with all notes, leases, open accounts and other bills receivable, for or on account of sewing machines theretofore sold by him, or which he might thereafter sell. The lien however, was to be subject and subordinate to the payment of rent, taxes, and the expenses of conducting the business, including salaries, wages, costs, fees, and charges, together with the cost price of any machines or other goods or merchandise which the receiver might purchase.

By a subsequent decree, Henry C. Jones was discharged from the receivership, and J. H. Derbyshire was appointed receiver in his place and stead, and was clothed with all the rights and privileges, and subjected to all the liabilities and duties conferred or imposed upon the former by previous decrees in the cause.

Afterward, the business having been attended with considerable loss, the cause was referred to a commissioner in chancery, ⁴¹⁴ to take certain accounts, looking to a final settlement of the affairs of the company. The commissioner reported a large claim in favor of the receiver of the Domestic Manufacturing Company, composed of open accounts and receiver's certificates. He also reported the demand of the State Bank of Virginia, represented by notes discounted by it for Receiver Derbyshire, and receiver's certificates. The commissioner says of this latter claim: "The business was continued by Receiver Derbyshire under these decrees, and on the 16th of December, 1896, the State Bank of Virginia held certain notes which had been discounted for Receiver Derbyshire of the face value of \$6,614.34. . . . The receiver believed that he could collect these notes to better advantage than the bank, and wished to get possession of them for that purpose. With this object in view, the evidence shows that he made the following agreement with the bank. 'On December 16, 1896, said bank discounted seventeen receiver's certificates, to wit: Nos. 1 to 16, inclusive, and No. 41, dated December 15, 1896, of the face value of \$8,500, and payable to the State Bank of Virginia, on April 26, 1897, with interest from date. Said bank thereupon credited the account of said receiver by \$8,500, whereupon the receiver on the same day checked on said account for the sum of \$6,615.34, and received the discounted notes mentioned above, amounting to that sum, upon the understanding and parol agreement that he was to hold said notes as a special trust fund, and deposit all collections made on account thereof to the credit of J. H. Derbyshire, trustee, in said bank, to be applied to the payment of said receiver's certificates. Thereupon the notes were marked paid in the home discount book and discount ledger of said bank.' "

It appears that the account of J. H. Derbyshire, trustee, was opened with the bank December 19, 1896, and continued throughout his receivership. From the trustee's account, the receiver's certificates held by the bank were reduced from \$8,500 to \$6,000, and on July 23, 1897, there was a balance to the ⁴¹⁵ trustee's account of \$1,217.41. It further appears that while Derbyshire was holding withdrawn notes amounting to \$6,615.34, and making deposits in the bank to the trustee's account, he collected five notes made by A. Kent, belonging to the trust fund, amounting in the aggregate to \$2,531.64; that he did not deposit these collections to the credit of the

trustee's account but applied them to current expenses of the receivership. He, however, substituted \$4,396.28 of other notes and accounts held by him as receiver, in the place of the Kent notes, as collateral security for discounts of negotiable notes and receiver's certificates discounted at the bank.

It must be observed that to the extent of \$6,615.34, the \$8,500 of receiver's certificates held by the bank were composed of notes previously discounted by the bank for the receiver.

In reporting demands against the assets of the company, the commissioner allowed precedence to the amount due the bank from the receivership for discounts of notes, over the open accounts due the receiver of the Domestic Manufacturing Company for the purchase price of sewing machines; but gave preference to the latter over the residue of receiver's certificates held by the former. To this finding of the commissioner the receiver of the Domestic Manufacturing Company excepted, and insisted: 1. That the commissioner should have found and reported that Receiver Derbyshire had no authority to enter into the agreement of December 16, 1897, with the bank; 2. That the receiver had no authority to withdraw any funds in his possession, as receiver, from the disposition directed to be made by the court, and to deposit them to his credit as trustee in the bank; 3. That the sum of \$1,217.41, so deposited, belonged to the general funds of the receivership, and should not have been applied to the payment of receiver's certificates owned by the bank; 4. That the commissioner ought not to have reported that the bank was entitled to have the proceeds of the notes and accounts ⁴¹⁶pledged by the receiver, applied to receiver's certificates held by it; 5. That all receiver's certificates stood upon an equal footing, and the bank having held originally \$8,500 of these certificates, and having received \$2,500 out of the funds of the receivership, should refund and pay back to the receivership that amount, and make claim for its \$8,500 of receiver's certificates, subject to all prior claims; 6. That the commissioner ought not to have reported that the bank was entitled to be paid \$2,797.82 for notes discounted by it, before anything should be paid exceptant on his open account, but should have given preference to the entire open account of exceptant, or, at most, have placed their demands on the same footing.

The bank excepted, because the commissioner reported the balance due it on receiver's certificates, not based on discounted

notes, as a debt of the fourth class, thereby postponing it to the open accounts of the receiver of the Domestic Manufacturing Company, its contention being that, as to said balance, the bank was entitled to priority over the other debts of the fourth class and of said open accounts.

The decree appealed from sustained exceptions 1 to 5, inclusive, and overruled exception 6, and also the exception of the bank, and this ruling gives rise to the case presented on appeal.

In his memorandum for decree, the chancellor concedes Receiver Derbyshire's authority to discount notes which came into his hands in the course of business, and to protect them at maturity, either by payment with money or other notes, upon default of the makers; and also his authority to pledge other notes as collateral security for such discounted notes. He declares that "all such discounted notes constitute a claim of the first dignity against the assets of the receivership." But that "the receiver had no authority to pledge the notes, nor any other part of the ⁴¹⁷ assets of the receivership in his hands, as collateral security for the payment of receiver's certificates; nor had he authority to pay off any of these certificates with the proceeds of notes which he had undertaken to pledge as security therefor, nor in any other manner. So far as the bank's claim is based on notes discounted for the receiver, it has precedence over the open accounts of the receiver of the Domestic Manufacturing Company, of course, over all the receiver's certificates, and the bank has the right to hold the collaterals as security for the payment of its claim.

"In settling the account between the bank and the receiver, credit the bank by all the sums advanced to the receiver in the way of discounts, and with interest thereon, and charge it with all the money it has received from the receiver, or from the collaterals in payment of such advances. All the receiver's certificates must stand on the same footing. All persons dealing with the receiver must be charged with full knowledge of the proceedings and the decrees in this cause, so far as they confer and limit his authority and powers.

"Sustain the first five exceptions to the commissioner's report, and overrule the sixth, and overrule the exception of the bank."

This ruling is, in effect, a recognition of the authority of Receiver Derbyshire to enter into the arrangement made between him and the bank in relation to discounting notes, "and

his right to pledge other notes as collateral security for such discounted notes," which is precisely the view taken of the transaction by the commissioner; nevertheless, the practical result from the conclusion reached, and the decree sustaining the five exceptions of the receiver of the Domestic Manufacturing Company to the report, was to deprive the bank of the very preference to which it had been declared entitled.

"The contracts of a receiver made with express or implied authority cannot be annulled at the pleasure of the court": Beach ⁴¹⁸ on Receivers, sec. 329; *Vanderbilt v. Central R. R. Co.*, 43 N. J. Eq. 669, 12 Atl. 188.

There is a well-recognized distinction by the authorities between passive receivers, who merely preserve the property, collect the assets, and report the fund to the court for distribution, and active receivers, to whom are confided the management of going concerns. The powers of the latter are necessarily very much broader than those of the former.

It is contended for the appellee that the acceptance by the bank of receiver's certificates for the amount of its demand for discounts was a novation of its original claim, and an extinguishment of any priority that may have attached to it. Whether a new security shall be taken to be a novation, or substitution for, and an extinguishment of, a prior indebtedness, is a matter of intention; and the burden rests upon him who asserts that there has been such novation to establish it. The rule is stated thus by this court, in a recent case of *Fidelity Loan etc. Co. v. Engleby*, 99 Va. 168, 37 S. E. 957: "Whether or not a debt has been novated is a question of fact, and depends entirely upon the intention of the parties to the particular transaction claimed to be a novation. In the absence of satisfactory proof to the contrary, the presumption is that the debt has not been extinguished by taking the new evidence of indebtedness. The fact that the word 'paid' was stamped on evidences of debt surrendered to the debtor is not, standing alone, a controlling circumstance to show satisfaction." It is apparent that neither the receiver nor the bank, in this instance, intended a novation, for, after delivery of the receiver's certificates, the parties continued to act on the basis of the original agreement, using the receiver's certificates merely for the purpose of evidencing the true amount due from the receiver to the bank.

Under the decrees of the court, the receiver plainly had authority to discount notes which came into his hands in the

course of business with the bank, and to protect them by the hypothecation ⁴¹⁹ of other notes and securities as collateral; and when he did so, such collaterals, to the extent to which it became necessary to apply them to the protection of discounts, ceased to be assets of the receivership, and became the absolute property of the bank. Nor was their true status altered or affected by the circumstance that an agreement was made which, for convenience, the collaterals were delivered to Derbyshire to be collected by him and the avails deposited in the bank to his credit as trustee. In that respect he was not acting in the capacity of receiver, but the effect of the arrangement was to constitute him trustee or agent for the real owner of the collaterals, the bank. And if, as in the case of the Kent notes, he applied his collections to current expenses of the receivership, good faith required that he should make restitution to the bank, to that extent, out of other funds; and the assets of the receivership could in no wise be diminished or affected by the transaction.

The collaterals belonged to the bank, not to the receivership, and were delivered to Derbyshire as the agent of the bank, merely to facilitate their collection, stamped and impressed with a conceded trust.

The bank never parted with its equitable ownership or possession of the notes or their proceeds. The possession of Derbyshire, in legal contemplation, was its possession; and the receiver having, by misappropriation of the proceeds, gotten the benefit of money that belonged to the bank, should in equity and good conscience be required to reinstate the trust fund owned by the bank, and this may be done without the slightest prejudice to any other interest.

"A court of equity will follow a fund diverted from the owner or charged with a lien as far as it can be traced, and will enforce the true owner's rights against any property in which it may have been invested": *Fitzgerald v. Irby*, 99 Va. 81, 37 S. E. 777.

It is not perceived that the bank's demand, in excess of discounted notes protected by collaterals, evidenced by receiver's ⁴²⁰ certificates, stands on a different footing from, or is entitled to precedence over, claims of other creditors of the same class. The exception of the bank to the commissioner's report, denying such preference, was therefore properly overruled.

The findings of the commissioner upon the questions in-
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volved in this appeal were, in all respects, correct, and his report ought to have been confirmed.

The chancery court erred in sustaining the exceptions of the receiver of the Domestic Manufacturing Company to the report, and for that error the decree complained of must be reversed, and the cause remanded for further proceedings to be had therein in conformity with this opinion.

Novation of Contract is never presumed, and the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt: *Studebaker Bros. Mfg. Co. v. Endoin*, 51 La. Ann. 1263, 72 Am. St. Rep. 489, 26 South. 90. Whether a transaction amounts to a novation is a question of intention: *Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759; and is for the jury: *Terry v. Robbins*, 128 N. C. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

Receivers.—When it is proper to appoint a receiver is discussed in the monographic notes to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 29-97; *Cortleyeu v. Hathaway*, 64 Am. Dec. 482-495. The power to create liens by receivers is considered in the monographic note to *International Trust Co. v. United Coal Co.*, 83 Am. St. Rep. 72-80. The relation of receivers to pre-existing liens, and the remedies of creditors after their appointment are discussed in the monographic note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 852-384.

FIRST NATIONAL BANK OF RICHMOND v. HOLLAND.

[99 Va. 495, 39 S. E. 126.]

GIFT OF STOCK TO WIFE—SUBSEQUENT ACTS NOT AFFECTING.—A gift of bank stock from a husband to his wife is not affected by a mention of the stock in his subsequent will and deed of trust, nor by the payment of dividends to him, the stock continuing to stand in his name. (pp. 901, 902.)

GIFT TO WIFE.—DECLARATIONS OF A HUSBAND, free from debt at the time they are made, are admissible to prove a gift to his wife. (p. 902.)

GIFT OF STOCK TO WIFE—WHEN COMPLETE.—The delivery of a certificate of bank stock by a husband to his wife with intent to transfer title by way of gift is effectual as an equitable assignment, although no legal title passes for want of indorsement on the certificate, or transfer on the books of the bank. (p. 903.)

GIFTS.—THE WORDS “GOODS AND CHATTELS,” used in a statute relating to gifts, do not include “choses in action,” but cover only tangible and visible property. (pp. 904, 907.)

A CHOSE IN ACTION is the money, damages, or thing owing; the bond, note, or security is but the evidence of it. (p. 905.)

E. E. Bouldin, Peatross & Harris, Blackford, Horsley & Blackford, and Williams & Williams, for the appellants.

Berkeley & Harrison, J. Sidney Smith, and Christian & Christian, for the appellees.

⁴⁹⁶ HARRISON, J. This controversy is between the creditors of John W. Holland, deceased, on the one hand, and Ola F. Holland, the widow of John W. Holland, on the other, and involves the title to one hundred and twenty shares of the capital stock of the Merchants' Bank of Danville. The appellee, Ola F. Holland, claims the stock by virtue of a parol gift alleged to have been made to her by her husband prior to the creation of the debts, to the payment of which it is now sought to subject the stock. The claim of the appellee is resisted by the creditors, upon the ground that no valid gift has been established, and, in support of this general proposition, several contentions are made which will be considered in proper order.

It appears that in 1889 John W. Holland, then advanced in life, married the appellee, a comparatively young woman; that he was the owner of one hundred and twenty shares of the capital stock of the Merchants' Bank of Danville, evidenced by a single certificate, "No. 45," and that, as early as January, 1892, he ⁴⁹⁷ had delivered this certificate, without indorsement, to his wife as a gift to her of the one hundred and twenty shares represented by it. It further appears that, at the time of this transaction, John W. Holland was a wealthy man, the value of the stock in question being but a small part of his estate, and that he was free from debt either as principal or as surety for other persons. It further appears that on the 30th of January, 1892, the appellee bought and had delivered at her house an iron safe, with her name inscribed thereon, which she kept in her own room, and in which she placed, on that day, for safekeeping, the certificate of stock "No. 45"; that no one but herself had the combination to this safe, or ever thereafter had in possession the stock scrip in question, or exercised any control over it. Some time in 1896 the appellee, having been advised that it was best to have the stock transferred to her on the books of the bank, produced the certificate for the counsel of her husband to write the assignment to her. This was done, and the assign-

ment duly executed by the husband. It further appears that on January 2, 1897, the original scrip, "No. 45," was delivered to the bank, and scrip No. 72, in the name of the appellee, issued in its stead, and her name entered on the books of the bank as a stockholder. Up to January, 1897, the stock had stood in the name of John W. Holland, and he had retained his position as one of the directors of the bank, and all dividends declared on the stock had been passed to his credit with the bank, or a check given him therefor.

It further appears that John W. Holland made his will on February 8, 1892, in which the following disposition was made of the stock in question: "I also give, devise, and bequeath unto my said wife one hundred and twenty shares of the stock of the Merchants' Bank of Danville, Virginia, now held and owned by me," providing, further on, that the stock should be in no way subject to the control of his personal representatives except so far as it might be their duty to transfer the same to his wife. This will was prepared by Judge Berryman Green, a learned lawyer, who ⁴⁹⁸ had been for many years the intimate friend and counsel of the testator. After testifying in clear and positive terms that, at the time of the execution of this will, the stock certificate in question was in the possession of the appellee, and that John W. Holland then told him he had already given the stock to his wife, Judge Green says, in explanation of the stock being referred to in the will, that Mr. Holland wished to mention specifically all the property he had given to his wife, and that, being entirely solvent, and free of debt, he did not desire to make the gift public because it would involve the surrender of his position as one of the directors in the bank. It further appears that on January 1, 1897, John W. Holland, having become heavily involved as indorser for a brother, executed a deed of trust, for the benefit of his creditors to Judge Berryman Green. In that deed the stock in question is thus referred to: "Whatsoever interest, if any, said party of the first part may have in one hundred and twenty shares of the capital stock of the Merchants' Bank of Danville aforesaid, this stock having been given and transferred to his wife, Ola F. Holland, and possession thereof delivered to her long prior to the execution of this deed, the party of the first part makes no claim thereto, and believes that he has no interest therein, but with a view of protecting her as far as possible, in the event of any claim being asserted thereto by creditors, said party of the

first part hereby assigns, transfers, and sets over all interest, legal and equitable, whatsoever, that may be in him in said stock and directs that the same shall not be sold or disposed of unless the other property herein conveyed shall be insufficient to meet and pay off the liabilities secured hereunder."

In the bill filed by Judge Green, trustee, asking the court's aid in the administration of his trust, after setting forth the foregoing clause of the deed, he says: "In spite of this plain and explicit disclaimer of the said John W. Holland of any and all interest in the stock as above set forth, some of the creditors secured in said deed have, through their counsel, demanded of ⁴⁹⁹ your orator, as trustee, that he shall take immediate charge of the said stock and apply the same to the debts secured," etc. The foregoing facts are sufficient to make clear the several questions presented by appellants in contesting the validity of appellee's claim.

It is not necessary to pass upon the competency of Mrs. Holland as a witness in her own behalf, for, independently of her testimony, the fact of the gift of the stock, as early as January, 1892, and the unqualified possession and exclusive control of the original certificate by Mrs. Holland until the same was surrendered and the new certificate issued in her name, is abundantly established by clear and conclusive evidence.

In the light of the convincing proof of the previous gift of the stock to the wife, the subsequent conduct of Holland in embracing the same property in his will and deed of trust is confirmatory, rather than derogatory, of her prior title. The language of the will, especially in view of Judge Green's explanation of the motive for mentioning the stock, and his testimony that, prior to drafting the will, the testator had advised him of the previous gift of this stock to his wife, makes it clear, we think, that it was not intended thereby to affect the previous gift, but to facilitate, in case of the testator's death, the due legal transfer of the stock on the books of the bank. The language of the deed of trust, which was made five years after the original gift, is a distinct and emphatic recognition of the gift as made long prior to the execution of the deed, and a disclaimer of all right to, or interest in, the stock. The language used in conveying the stock can bear no other construction than that, in the event of a successful adverse claim by creditors, the grantor desired to provide how the trustee should handle the stock to secure the

best results for his wife. If, however, these instruments, made and executed by John W. Holland subsequent to the gift of the stock, were susceptible of a different construction, they were his acts, and not the acts of his wife. She was not ⁵⁰⁰ privy to either the will or the deed, and is not claiming under either, but holds her title superior to both, and her rights cannot be affected thereby. Nor could the payment of dividends to John W. Holland after the stock was given to his wife affect her rights. The stock continued to stand in his name until January, 1897, and it was therefore natural that the dividends should be passed to his credit on the books of the bank. This may have been done with the wife's knowledge and without objection on her part, but, be that as it may, the circumstance is overcome by the clear proof of the gift.

It is contended by the appellants that all statements made by the witnesses, Berryman Green, W. W. Holland, and Mary S. Fowlkes, of admissions made by John W. Holland that he had given the stock to his wife are inadmissible because, if he were now living, he would be incompetent to testify to the same fact. It must be borne in mind that the statements of John W. Holland, sought to be excluded, were made by him when he was entirely free from debt. The question is, therefore, whether declarations of a husband, who is free from debt at the time the declarations are made, are admissible to prove a gift in favor of his wife. Upon well-settled principles, we answer this question in the affirmative. Not only was the gift in question made when the donor was free from debt, but his declarations touching the gift were practically contemporaneous therewith, and made when, as shown by the record, from the nature of things, he could have had no suspicion of the financial difficulties in which he was subsequently involved by the speculations of his brother. The case of *Massey v. Yancey*, 90 Va. 626, 19 S. E. 184, relied on by appellants does not conflict with the conclusion that the declarations of John W. Holland were admissible. In that case Massey and his wife were living, and both were parties to the suit. The assignment there under consideration was made after the indebtedness was created, and the object of introducing the admissions of Massey was to show that he had no interest in the subject ⁵⁰¹ of the assignment made by him, but that it belonged to his wife. The court held that Massey could not have been a competent wit-

ness in his wife's favor, and that his declarations made under the circumstances were equally inadmissible. That case has no application to the one before us, where the declarations relied on were made at a time when the donor was free from debt, and therefore against interest, and without the slightest temptation to make such declarations falsely. Nor is the contention sound that such admissions are inhibited by the act of 1897-98, page 753, declaring that "neither the husband nor wife shall be competent to testify for or against each other in any proceeding by a creditor to avoid or impeach any conveyance, gift, or sale from the one to the other on the ground of fraud or want of consideration," etc. It is clear that the policy of this statute was to prevent the husband or wife from testifying in favor of the other in support of a gift made when the donor was indebted, for the obvious reason that declarations or testimony, given after the donor was in debt, to sustain a prior transfer are suspicious and dangerous. But neither the letter nor the spirit of the statute forbids declarations made by the husband before he was in debt from being introduced in proof of the gift. Such admissions are free from all suspicion, and are governed by the general principles of the law with respect to declarations against interest.

To hold inadmissible the declarations of the husband made under the circumstances of the case in judgment would be, as said by the learned judge of the circuit court, to defeat a class of benefactions which, under certain conditions, are not only lawful, but are in a high degree commendable.

It is further contended by appellant that the gift of the stock by John W. Holland to his wife was not complete, because the certificate delivered to her was not indorsed, the power of attorney to transfer the shares not being signed by the donor. This position is not tenable. It is well settled by the modern authorities that choses in action not negotiable, and negotiable paper ⁵⁰² not indorsed, may be the subject of a gift, and that a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. The delivery, therefore, of a certificate of stock, unindorsed, by the donor to the donee, with intent to transfer title by way of gift is effectual as an equitable assignment, although no legal title passes for want of an indorsement and transfer on the books of the bank: 3 Wait's Actions and Defenses, 491, 506; Thompson on Private Corporations, sec.

2930; Graves on Title to Personal Property, 21; Leyson v. Davis, 17 Mont. 220, 42 Pac. 775; Basket v. Hassel, 107 U. S. 602, 2 Sup. Ct. Rep. 415; Thomas v. Lewis, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389. In the case last cited the gift under consideration was accomplished by the delivery to Bettie Lewis of the keys to a safety deposit box which was in a vault in the Planters' Bank. An inspection of the record shows that among the contents of the safety deposit box were certain stocks, some of which had been bought by Thomas and not indorsed by him and others stood in his name, and none of them had been indorsed or transferred on the back to the donee, Bettie Lewis. The court held that all the stocks in the box had been sufficiently delivered by the delivery of the keys to the box containing the certificates. It would seem that, if the delivery of the keys to a box containing unindorsed certificates of stock was sufficient to constitute a transfer of the equitable title to the stock represented by those certificates, a fortiori the delivery of the certificates themselves would have been deemed a sufficient delivery to vest title in the donee.

In Basket v. Hassel, 107 U. S. 602, 2 Sup. Ct. Rep. 415, it was regarded as unquestionable that a delivery of the certificate of deposit involved therein to the donees, without an indorsement, would have transferred the whole title and interest of the donor in the funds.

We hold, therefore, that it was not indispensable to the validity of the transfer of the stock in question that there should have been any indorsement on the certificate, or transfer on the books of the bank; that the delivery of the certificate, ⁵⁰³ without indorsement, by John W. Holland to his wife with intent to give her the stock, vested in Mrs. Holland the complete equitable title, and divested her husband of all present control and dominion over the same. The only effect of the subsequent indorsement of the certificate and transfer of the stock on the books of the bank was to vest in the donee the legal title to that in which she already had the beneficial interest. This she could have compelled if it had not been done voluntarily.

The remaining question is whether section 2414 of the code applies to the gift in question and renders it invalid, because the donor and donee were husband and wife, residing together at the time of the gift. That section is in these words: "No gift of any goods or chattels shall be valid, un-

less by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section."

The answer to this question depends upon whether the words "goods or chattels" in the section quoted were intended to embrace "choses in action." We have given this subject the earnest consideration it deserves, and have found the conclusion irresistible that the terms "goods or chattels" employed in section 2414 were not intended to include "choses in action," but were only designed to cover tangible and visible property.

A chose in action is defined by Kent as a personal right not reduced into possession, but recoverable by a suit at law. Money due on bond, note, or other contract, damages due for breach of contract, for the detention of chattels or for torts, are included under this general head or title of things in action: 2 Kent's Commentaries, 11th ed., marg. p. 351. Any right which has not been reduced to possession is a chose in action: 1 Parsons on Contracts, c. 14, sec. 1. A chose in action is a mere right of action ⁵⁰⁴ to a personal chattel not in actual possession: *Purdue v. Jackson*, 1 Russ. 143, cited by Judge Allen in *Yerby v. Lynch*, 3 Gratt. 494.

Bouvier, in his Institutes, volume 1, page 191, says that a distinction must be made between the security or the evidence of the debt and the thing due. A deed, a bill of exchange, or promissory note, may be in the possession of the owner, but the money or damages due on them are no less choses in action. This distinction is to be kept in view. The chose in action is the money, damages, or thing owing; the bond or note, etc., is but the evidence of it. There can, in the nature of things, be no present possession of a thing which lies merely in action.

Now, the "goods and chattels," the subject of the gift under section 2414, must, by the terms of the section, be capable of actual possession—"shall have come to and remained with the donee, or some person claiming under him." Such possession can only be predicated of some visible, tangible, movable thing, and hence the subsequent language serves to explain and limit the meaning of the general terms which go before, and excludes the idea that they were intended to in-

clude mere "choses in action," which, as such, are incapable of actual possession.

The code is one act, prepared and adopted as such, and therefore in construing section 2414 we are not confined to the language of that section, but can look to other sections of the code where the same terms are employed. It would extend this opinion to a most unreasonable length to attempt a reference to each of the sections in which the words "goods or chattels," or "goods and chattels," are used. It must suffice to say that whenever it is intended to describe the whole interest or estate, the defined terms "real estate" and "personal estate" are generally employed; and whenever less than the whole is intended, different language is used. An examination of the code will show that in no instance are the words "goods and chattels" or "goods or chattels" used as the equivalent of "personal estate" as defined, but always in the limited sense of visible, tangible, movable ⁵⁰⁵ personal chattels—such as are objects of the senses—deliverable in specie. For example, section 627 provides that, when the officer cannot find sufficient "goods or chattels" to distrain for taxes or levies, he may proceed to collect the same by garnishment; that is, by subjecting the choses in action of the delinquent taxpayer.

Sections 2414, 2461, 2462, 2465, and 2569 all relate to gifts, loans, sales or partition of the same kind of property, described by the same terms—namely, "goods or chattels" or "goods and chattels." They are closely connected in subject matter and in the language employed, and it can hardly be doubted that whatever was meant by the words "goods or chattels" or "goods and chattels" in either one of these sections must have been intended of the same words in each of the other sections. This court has decided that the words "goods and chattels" in section 2465 mean visible, tangible, personal property only; that they do not include "choses in action": *Kirkland v. Brune*, 31 Gratt. 126. This decision has since been repeatedly followed.

Sections 2414 and 2465 are so closely related as to the subject matter of gifts that they may be said to be in *pari materia*, and should be construed together. Both relate to goods and chattels; section 2414 wholly, and section 2465 in part. There can be no good reason why the words "goods or chattels" or "goods and chattels" should have a meaning in section 2465 that they do not have in section 2414. As to the

rule of construing statutes in *pari materia* and the application of the rule in the construction of the code, see *Dillard v. Thornton*, 29 Gratt. 396; *Easly v. Barksdale*, 75 Va. 281.

From our view of the several sections of the code in which the words "goods or chattels" or "goods and chattels" are found it seems clear that these terms, in every instance, are limited in meaning to corporeal personal property. If it was intended by their use in section 2414, or any other section, to comprehend all property not real, incorporeal as well as corporeal personal ⁵⁰⁶ property, it is strange that the legislature did not make its meaning plain by the use of the terms "personal estate." Those terms are defined by the code, and, as defined, include every possible property interest except real estate. Throughout the code the terms "personal estate" are employed whenever personal property in its most extensive sense is intended.

The history of this legislation sheds light upon the question under consideration, and fortifies, we think, the view that "choses in action" were not intended to be embraced by the terms "goods or chattels" used in section 2414. The first act was passed in 1757, and from that time until the revision of the code in 1849, nearly one hundred years, the law was confined to gifts of slaves. At the revision of 1849 two important changes were made. After the word "slave" were inserted "or of any goods or chattels," and a new clause was added at the end of the section in these words: "If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section": Code 1849, c. 96, sec. 1. With the words "of a slave or" stricken out, the law, as found in the code of 1849, has been carried into section 2414 of the present code. Slaves were chattels. Though not specifically named, they were always considered as embraced in the terms "goods or chattels," and under the rule *ejusdem generis*, which is applicable in this case, the "goods or chattels" mentioned in section 2414 must be regarded and treated as of the same class or kind of chattels to which a slave belonged—that is, visible, tangible, movable, personal property. It was to this kind of property—slaves—the language, "actual possession coming to and remaining with the donee or some person claiming under him," was first applied in 1787. The same language remains to-day, and though the word "slave" has been stricken out since the words "goods and chattels" were

inserted, that circumstance does not render the rule less applicable: Sedgwick on Statutory and Constitutional Law, 1st ed., 250.

⁵⁰⁷ Counsel for the appellee have furnished us with the very learned and able brief of the late Judge E. C. Burks in the case of *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, as their argument touching the proper construction of section 2414. That valuable paper has been freely used and quoted as the best means of expressing in a clear and satisfactory manner the court's view of the question under consideration.

Upon the whole case, we are of opinion that there is no error in the decree appealed from, and it is affirmed.

To Constitute a Gift, there must be a delivery to the donee or an express declaration of trust in his favor: *Getchell v. Biddeford Sav. Bank*, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895. A married woman cannot acquire property by gift directly from her husband: *Brown v. Brown*, 174 Mass. 197, 75 Am. St. Rep. 292, 54 N. E. 532. Compare *Botts v. Gooch*, 97 Mo. 88, 10 Am. St. Rep. 286, 11 S. W. 42. A gift of a bank deposit may be effected, though there is no change of credit on the books of the bank: *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454, 85 N. W. 915. But it has been held that a gift of corporate stock, *inter vivos*, is not complete without a transfer on the books of the corporation, and that equity will not compel a transfer by the corporation: *Baltimore Retort etc. Co. v. Mall*, 65 Md. 93, 57 Am. Rep. 304, 3 Atl. 286. But see *Victor G. Bloede Co. v. Bloede*, 84 Md. 129, 57 Am. St. Rep. 373, 34 Atl. 1127.

A Chose in Action is a thing of which one has not the possession or actual enjoyment, but only a right to or a right to demand by an action at law: *Sallee v. Arnold*, 82 Mo. 532, 82 Am. Dec. 144.

VAUGHT v. MEADOR.

[99 Va. 569, 39 S. E. 225.]

FOREIGN JUDGMENT.—THE VALIDITY OF THE CONTRACT upon which a judgment is rendered in a sister state is established by such judgment, and cannot afterward be questioned. (p. 910.)

EQUITY—EXTENT OF RELIEF.—WHEN EQUITY ACQUIRES JURISDICTION for any purpose, it will do complete justice between the parties, enforcing, if necessary, legal rights, and applying legal remedies. (p. 911.)

DECREE—EXTRATERRITORIAL EFFECT.—If a decree determines the equities of the parties in respect to land in another state, and directs a conveyance in accordance therewith, such decree, while it does not operate to transfer the title, may be

pleaded as a cause of action or as a defense in the courts of the state where the land is situated, and is there entitled to the force and effect of record evidence of the equities determined. (pp. 911, 912.)

EQUITY JURISDICTION.—IT IS NO VIOLATION OF THE SOVEREIGNTY OF ONE STATE for a court of equity of another state to compel a party before it to do an act which, if done voluntarily anywhere, would not be such violation. (pp. 912, 913.)

FOREIGN JUDGMENT.—IF A PARTY SEEKING TO ENFORCE a judgment of a sister state has by fraud obtained real property of the defendant without the state on which he held a deed of trust to secure the debt on which the judgment was based, the parties should be restored to the positions they occupied before the fraud was committed, or the value of the property should be set off against the judgment, with a decree for the excess, if any, in favor of the defendant. (p. 913.)

Samuel W. Williams, for the appellants.

Henson & Mason, for the appellee.

⁵⁷⁰ **CARDWELL, J.** January 27, 1892, Rufus F. Vaught and Elizabeth H. Vaught his wife, residents of the county of Mercer, West Virginia, executed a deed to one J. W. Hale, trustee of the same county and state, conveying to him a tract of one hundred and sixty-two and one-half acres of land situated in said county, "in trust to secure payment of a note executed January 25, 1892, by Rufus F. Vaught, payable one day after date, with interest from date, to the order of Meador and Pack, for the sum of three hundred and thirty-one one-hundredths dollars." On the 23d of March, 1897, Meador obtained, before a justice of the peace in the county of Mercer, a judgment against Rufus F. Vaught and Elizabeth H. Vaught, his wife, for the sum of three hundred dollars principal, and one hundred and forty-one dollars interest, the whole amount aggregating four hundred and forty-one dollars, to bear interest from the ⁵⁷¹ date of the judgment. The summons of the justice upon which the judgment was rendered shows that the action was "for the recovery of money due by note," and the proof in this record leaves no room to doubt that the note was none other than the note of Rufus F. Vaught secured by the deed of trust above referred to, but it does not appear whether the land embraced in the deed of trust was that of Rufus F. Vaught, or his wife.

To the April rules, 1897, of the circuit court of Giles county, R. G. Meador brought suit by way of foreign attachment in equity against Rufus F. Vaught, Elizabeth H. Vaught, and

others, and in his bill sets out the above-mentioned judgment; and avers the nonresidence of Rufus F. and Elizabeth Vaught; that the latter was a married woman at the time of the rendition of the judgment; that she was a daughter of one John A. Cook, who had a short while before died intestate, leaving valuable real estate in the county of Giles, which descended to his heirs at law, and also some personal estate; and that the plaintiff has the right to come into a court of equity and have Elizabeth Vaught's interest in the realty and the personalty of which her father died seised and possessed attached and subjected to the payment of his debt.

Elizabeth Vaught appeared at the May term of the court, 1897, and filed her special plea of coverture, to the filing of which the plaintiff objected, and the court without passing on the exception made its decree directing certain accounts to be taken.

At the May term, 1899, of the court, the plaintiff confessed the truth of the plea of coverture, and Rufus F. and Elizabeth Vaught filed their joint demurrer and answer to the bill, to which answer the plaintiff filed exceptions in writing, which were sustained by the court, and the greater part of the answer stricken out. Whereupon, Rufus F. and Elizabeth Vaught filed their joint amended answer, which was also stricken out on written exceptions thereto.

By that part of the original answer which was stricken out ⁵⁷² the defense sought to be made was that the plaintiff's judgment had been paid and fully satisfied. The answer averred that, after the judgment was rendered, and before this suit was brought, the trustee in the deed of trust which had been given by the respondents on the Mercer county land to secure the debt for which the judgment was given had executed a deed purporting to convey the land to the plaintiff; that the recitals in the deed that the land had been sold as required by law and purchased by the plaintiff were false and untrue; that the land was not advertised nor sold as required by law, nor as required by the trust deed; that the trustee acted at the pretended sale as the bidder for the plaintiff, and bid off the land for him at one hundred dollars which was such a ruinous and outrageous sacrifice of it as would shock the moral sense of a chancellor; that the land at the time of the pretended sale was worth at least one thousand dollars, and plaintiff had thereafter sold it at the price of eight hundred dollars and institutes this suit supported by affidavit

claiming the whole of his debt, not even giving credit for the one hundred dollars. The respondents sought to set up this fraud as a defense, and to have the plaintiff account for the full value of their land so obtained by him, and the same set off against his alleged debt, and to this end asked that their answer be treated as a cross-bill. By their amended answer, respondents sought to present the issue of payment and satisfaction.

The accounts directed having been duly taken and filed in the cause, the circuit court, at its May term, 1900, made a decree subjecting to the satisfaction of plaintiff's debt Elizabeth Vaught's interest in the estate of her father. From this decree Vaught and wife appealed to this court.

It seems beyond controversy that the validity of the contract, upon which a judgment is rendered by a court of competent jurisdiction in a foreign state, is established by the judgment, and the judgment must be given the same credit and effect in this state, in which it is sought to be enforced, as it had in the state ⁵⁷⁸ where rendered: 2 Black on Judgments, sec. 925; Clarke v. Day, 2 Leigh, 172; Dicey on Conflict of Laws, 435, and authorities there cited.

It is proven in this case that when the judgment in question was rendered a justice of the peace under the constitution and laws of West Virginia had jurisdiction in a civil action based upon a note, the principal of which is not over three hundred dollars, and to render a judgment thereon for the principal and its accumulated interest when the principal and interest aggregated more than three hundred dollars, but the judgment should show what portion thereof was the principal of the note, and what portion was accumulated interest thereon.

The doctrine has been so often repeated in the decisions of this and other courts that it is now regarded as a well-established rule that, when a court of equity acquires jurisdiction of a cause, for any purpose, it will retain it and do complete justice between the parties, enforcing, if necessary, legal rights, and applying legal remedies to accomplish that end: Laurel Creek etc. Co. v. Browning, 99 Va. 528, 39 S. E. 156, just decided, and authorities there cited.

The defenses sought to be set up by that part of appellants' answer stricken out by the circuit court grew substantially out of the same transaction with the debt sued on in this cause, and it is no answer to these defenses to say that

appellee here, plaintiff below, was a nonresident. He had submitted himself to the jurisdiction of the court, and it was clearly within its power to impose upon him such terms as were just and equitable, if the averments of the answer were sustained by the proof adduced to support them.

While the court's decree in such a case would not operate to transfer title to land in West Virginia, it would, with respect to all matters and things properly adjudicated and determined by the court, be binding upon the consciences of the parties thereto, and when the decree finds and determines the equities of the ⁵⁷⁴ parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action or as a ground of defense in the courts of the state where the land is situated; and it is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud. It has also been held that a court of equity, having jurisdiction of the parties, has the power to compel the defendant to release and discharge an apparent cloud upon the title to land situated in another state. On the same principle, if a title or power affecting lands in another state was obtained by duress or fraud, a personal decree may be had, upon proper averments, vacating such title or power. Or if such lands have been converted into money, or money has been realized from them, by one acting under a fraudulent title or power, he can be compelled to account, either in law or equity, as the nature of the accounts or the character of the relief may require: 2 Black on Judgments, sec. 872, and authorities there cited.

In *Poindexter v. Burwell*, 82 Va. 507, it was held that a court of equity can act upon the person, if he be within its jurisdiction, and compel him to convey land situated in another state or otherwise comply with its decree.

In *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36, the doctrine was upheld that, while real estate is exclusively subject to the laws and jurisdiction of the courts of the state in which it is located, and courts of equity in one state cannot decree the sale of lands of a person under disability lying in another state, in cases of fraud, trust, or contract, courts of equity, having jurisdiction over the parties, may administer full relief, without regard to the nature or situation of the property, and may compel the conveyance of property which

lies beyond its jurisdiction, provided it can enforce its decree by the exercise of its power over the persons before it. It is, says the opinion, no violation ⁵⁷⁵ of the sovereignty of one state for a court of equity of another state to compel a party before it to do an act which, if done voluntarily anywhere, would not be such violation.

Pomeroy, in discussing the jurisdiction of courts of equity in cases of fraud, says: "It is impossible, especially in the United States, to formulate any universal rule concerning the extent or the exercise of the equitable jurisdiction in matters of fraud, since the decisions of different courts and in different states are directly at variance with respect to its existence and extent, and since its exercise must depend, to a great extent, upon the circumstances of particular cases, and even upon the temperaments and opinions of individual judges. The jurisdiction, where it exists, may be exercised by granting reliefs which are wholly pecuniary and therefore legal. In conferring these reliefs, which are purely equitable, and therefore exclusive, the power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar": 2 Pomeroy's Equity Jurisprudence, sec. 910.

In a recital, in the same section, of instances in which these equitable reliefs will be afforded, the learned author says that a party obtaining property by his fraud will be regarded, with respect to the property which he has so acquired, as a trustee for the party defrauded.

If the averments of appellant's answer, asked to be treated as a cross-bill, be true (and they must be so treated in considering objections to the answer), to deny the relief they ask would in effect allow appellee, by the grossest fraud, to acquire eight hundred dollars from the sale of appellant's land in Mercer county, West Virginia, on which he held a deed of trust to secure the very debt upon which is based the judgment he asserts in this cause, and give appellants no credit whatever therefor.

If it be found that appellee has, by his fraud, obtained property as to which he is to be regarded as a trustee for appellants, they should be restored to the positions they occupied before the ⁵⁷⁶ fraud was committed, or the value of the property should be set off against the judgment he sues on; and if there be a residue thereof, a decree in favor of appellants against appellee for such residue should be given.

We are of opinion, therefore, that the circuit court erred in sustaining the exceptions to appellant's answer, and its decree appealed from will be reversed and annulled, and the cause remanded to be further proceeded with in accordance with the views expressed in this opinion.

Equity Jurisdiction.—A court of equity having acquired jurisdiction of a cause for any purpose will generally retain it and make a final adjudication between the parties: *Lodor v. McGovern*, 48 N. J. Eq. 275, 27 Am. St. Rep. 446, 22 Atl. 199; *Lynch v. Metropolitan Elevated Ry. Co.* 129 N.Y. 274, 26 Am. St. Rep. 523, and cross-reference note thereto, 29 N. E. 315.

A Judgment of a Court of One State is a merger of the cause of action in every other state of the Union: *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663. Compare *Eastern etc. Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665. And full faith and credit must be given in every state to a judgment of a court of competent jurisdiction in one state: *Van Norman v. Gordon*, 172 Mass. 576, 70 Am. St. Rep. 804, 53 N. E. 267.

BANKERS' LOAN AND INVESTMENT CO. v. BLAIR

[99 Va. 606, 39 S. E. 231.]

UNRECORDED DEED—RECONVEYANCE—PRIORITY OF CREDITORS.—If a grantee fails to record his deed, and induces the grantor to reconvey to the grantee's wife, who assumes the purchase money notes originally given by her husband, the holders of these notes have priority over his judgment creditors seeking to subject the land. (p. 915.)

AN UNRECORDED DEED IS VOID as against creditors of the grantor. (p. 916.)

UNRECORDED DEED—RECONVEYANCE—GRANTOR'S CREDITORS.—If a grantee fails to record his deed, and induces the grantor to make a new deed to the grantee's wife, who with her husband executes a deed of trust on the property to secure a loan to pay the purchase money notes originally given by him and assumed by her, and both these deeds are recorded, creditors of the grantor cannot subject the property to judgments obtained against her subsequently to the recordation. (pp. 915, 917.)

JUDGMENTS.—DOCKETING AND INDEXING a judgment against a wife by the name of "Mrs. T. Frank Simmons" is not constructive notice that it is a lien on real estate standing on the record in the name of "May M. Simmons," though she is the wife of T. Frank Simmons. (p. 918.)

WIFE'S ESTATE—JUDGMENT AGAINST HUSBAND—CURTESY.—A husband has no interest, during coverture, in his wife's statutory separate estate to which the lien of judgments can attach, and a conveyance of the estate in which he unites defeats his right by the curtesy. (p. 918.)

Cocke & Glasgow, for the appellant.

Archer A. Phlegar, for the appellees.

607 BUCHANAN, J. On August 20, 1890, Dr. B. D. Downey purchased of Mrs. May M. Simmons a house and lot in the city of Roanoke, gave his notes for the deferred purchase price, and to secure their payment executed a deed of trust upon the same property which the deed of trust recited had been conveyed to him by Mrs. Simmons. The conveyance to Dr. Downey was not recorded and was either lost or destroyed.

In 1891 Mrs. Simmons executed a deed, dated August 20, 1890, to Dr. Downey's wife for the same property, who assumed to pay the notes executed by her husband. This deed was admitted to record October 19, 1891. Being pressed for the payment of these notes by the Fidelity Loan and Trust Company, the holders thereof, Mrs. Downey secured a loan from the appellant, the Bankers' Loan and Investment Company, and to secure its payment executed a deed of trust on the property, her husband uniting with her, which was admitted to record November 6, 1891. The proceeds of the loan, to the extent of the indebtedness due the Fidelity Loan and Trust Company, was paid to it, and the purchase money notes held by that company were taken up uncanceled and held by the Bankers' Loan and Investment Company for its protection.

A short time thereafter certain judgment creditors of Dr. Downey filed their bill to subject the house and lot to the payment of their judgments, in which they alleged that the property had been conveyed to Dr. Downey by Mrs. Simmons prior to her conveyance to Mrs. Downey, and that her deed was void and in fraud of their rights.

The case came to this court, and it was held that the Bankers' 608 Loan and Investment Company was substituted to the rights of the holders of the purchase money notes executed by Dr. Downey, and had priority over his judgment creditors seeking to subject the land: See Bankers' Loan etc. Co. v. Hornish, 94 Va. 608, 27 S. E. 459.

After the cause was remanded for further proceedings, Miss Gertrude Blair, by petition, which was treated as her answer and cross-bill, became a party to the suit. In her cross-bill she alleged that she was owner by assignment of two judgments, one rendered at the July term, 1891, of the hustings

court of the city of Roanoke against T. Frank Simmons, Mrs. T. Frank Simmons, and five other persons; that it was docketed the thirty-first day of the same month, and indexed in the name of Mrs. T. Frank Simmons; that on July 17, 1897, it was indexed in the name of May M. Simmons; that Mrs. Simmons sometimes signed her name as May M. Simmons and sometimes Mrs. T. Frank Simmons and of this fact the defendants to the cross-bill had notice; that the other judgment was rendered against May M. Simmons and T. Frank Simmons at the June term, 1892, of the same court, and docketed in their names July 21st of that year; that by deed dated August 20, 1890, Mrs. Simmons, who was the owner of the house and lot hereinbefore mentioned, sold and conveyed the same to Dr. D. B. Downey, who never recorded his deed; that by another deed dated the same day, but really executed in September, 1891, Mrs. Simmons conveyed the same property, her husband uniting in the deed, to Mrs. Mollie J. Downey, the wife of Dr. Downey, who had full notice of the prior conveyance to her husband; that this conveyance was not recorded until after the first-named judgment had been docketed; that by deed dated October 1, 1891, and recorded the 6th of that month, Mrs. Downey and her husband had conveyed the house and lot to Silas W. Burt, trustee, to secure a debt of seven thousand dollars, to the Bankers' Loan and Investment Company, and then detailed the proceedings had in the suit brought by the creditors of Dr. ⁶⁰⁹ Downey, which have already been sufficiently set out in this opinion. She further alleged that Mrs. Simmons had departed this life, and claimed that the judgments were prior liens upon the house and lot; or, if not liens upon the whole property, they were liens at least to the extent of the husband, T. Frank Simmons' curtesy therein, and prayed that her liens should be respected and protected, and the property sold for her benefit.

The ground upon which Miss Blair claims that her judgments are liens upon the house and lot, and have priority over the deed of trust securing the appellant, is that provision of section 2465 of the code which declares that a deed conveying real estate shall be void as to creditors and subsequent purchasers for valuable consideration without notice until and except from the time that it is duly admitted to record in the county or corporation where the property embraced in the deed is situated.

Under that section of the code, the unrecorded deed to Dr. Downey was void as to the creditors of Mrs. Simmons, and as to them the title remained in Mrs. Simmons as fully as if the deed had never been executed. This being so, if Mrs. Simmons had executed a new deed to Dr. Downey and he had recorded it, there can be no question that from the time it was recorded it would have invested him with title to the property as against the creditors of Mrs. Simmons, and that they could not have subjected it to judgments obtained against her subsequent to its recordation. Instead, however, of obtaining a new conveyance from Mrs. Simmons, or of setting up the lost deed and recording the same, Dr. Downey induced Mrs. Simmons, as must be inferred from the evidence in the cause, to convey the property to his wife, who assumed to pay the purchase price due from him, borrowed the money from the appellant with which to pay it, and to secure the loan executed the deed of trust upon the property, in which her husband united.

The conveyance to Mrs. Downey and the deed of trust executed by her and her husband operated, when recorded, to invest ^{§10} the trustee with title to the property as against the creditors of Mrs. Simmons, as fully and as completely as if Mrs. Simmons had executed the new deed to Dr. Downey, and he had executed the deed of trust to secure the money borrowed to pay the purchase price due from him. As against the creditors of Mrs. Simmons, the unrecorded deed was a mere nullity. As to them, it had no existence in contemplation of law, and their rights must be determined as if it had never been executed. They cannot treat the deed as a nullity for some purposes, and as valid for others. The fact that it may be valid between the parties and as to subsequent purchasers with notice does not affect them; it neither adds to nor detracts from their rights. That is a question for those parties; not for the creditors of Mrs. Simmons. This being true, unless the subsequently recorded deed to Mrs. Downey was made to hinder, delay, and defraud the creditors of Mrs. Simmons (and this is not claimed), they have no right to subject the property to judgments obtained or docketed against their debtor after the subsequent deed was put on record. Any other construction of the registry act upon the question under consideration would not only protect the creditors from any injury resulting from a failure to record the deed, but would give them greater rights than they would have had if the deed

had not been executed, and would enable them to subject the property to the payment of judgments obtained or docketed against their debtor after the record showed that she had no interest whatever in the property.

One of the judgments asserted by Miss Blair was obtained after the conveyance to Mrs. Downey and the deed of trust securing appellant had been recorded. The other was rendered against T. Frank Simmons, Mrs. T. Frank Simmons, and five others, and duly docketed and indexed in the names of the defendants as they appeared in the judgment, prior to the execution and recordation of the conveyances to Mrs. Downey and the trustee.

⁶¹¹ In July, 1897, the last-named judgment was indexed in the judgment lien docket in the name of "May M. Simmons, who is claimed to be Mrs. T. Frank Simmons." It is not shown that Mrs. Downey, or the parties who claim under her, had actual notice of that judgment when they purchased, or of the fact that Mrs. T. Frank Simmons and May M. Simmons were the same person. Docketing and indexing that judgment in the name of Mrs. T. Frank Simmons was not constructive notice that it was a lien upon the house and lot standing upon the record in the name of May M. Simmons. The trustee in the deed of trust and the appellant were chargeable with notice of the fact that the assignor of the appellee, Miss Blair, held a judgment against Mrs. T. Frank Simmons, and of the amount, terms, and character thereof but they were not chargeable with notice that May M. Simmons, the grantor of Mrs. Downey, and Mrs. T. Frank Simmons named in the judgment, and in whose name it was docketed, were the same person. The judgment did not disclose that fact, nor did it suggest any fact that would have led up to that fact: Virginia Code, sec. 3561; Ridgway's Appeal, 15 Pa. St. 177, 53 Am. Dec. 586; Johnson v. Hess, 126 Ind. 298, 25 N. E. 445; see Pomeroy's Equity Jurisprudence, secs. 654, 655. Indeed, counsel for appellant did not, either in his brief or oral argument seem to place much reliance upon that contention.

The cross-bill claims that the judgments are at least liens upon the husband, T. Frank Simmons', estate by the curtesy in the property. The property was the wife's statutory separate estate. During her life he had no interest in it upon which the lien of the judgments could attach, and she having aliened the property by a conveyance in which he united,

his right by the curtesy was defeated: *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Campbell v. McBee*, 92 Va. 68, 22 S. E. 807.

We are of opinion, therefore, that the judgments asserted by Miss Blair are not liens upon the house and lot mentioned; and ⁶¹² that the corporation court erred in so decreeing. The decree appealed from must be reversed and this court will enter a decree dismissing Miss Blair's cross-bill, and remanding the cause for further proceedings.

An Unrecorded Deed is Void as to all creditors who, but for the deed, would have a right to subject the property to their debts, whether contracted before or after the date of the deed: *Price v. Wall*, 97 Va. 334, 75 Am. St. Rep. 788, 83 S. E. 599. See, in this connection, *Wilhelm v. Wilkin*, 149 N. Y. 447, 52 Am. St. Rep. 743, 44 N. E. 82.

A Judgment is not a Lien on land conveyed by the judgment debtor, before the rendition of the judgment, to defraud his creditors: *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216, 52 N. E. 361; *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116, 55 S. W. 137; *Preston-Parton Mill Co. v. Horton*, 22 Wash. 236, 79 Am. St. Rep. 928, 60 Pac. 412. Compare *First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927.

The Docket Entry of a Judgment against Edward Davis is not constructive notice of a lien on the real estate of either E. A. Davis or Edward A. Davis: *Davis v. Steeps*, 87 Wis. 472, 41 Am. St. Rep. 51, 58 N. W. 769. See, too, *Crouse v. Murphy*, 140 Pa. St. 335, 23 Am. St. Rep. 232, 21 Atl. 358. Compare *Johnson v. Schloesser*, 146 Ind. 509, 58 Am. St. Rep. 367, 45 N. E. 509.

MILLER v. MILLER.

[99 Va. 662, 39 S. E. 597.]

WILLS—INTERPRETATION OF "FAMILY."—If a testator in his will directs his executor to care for and support a certain named person "as long as she remains a member of my family, or until she becomes twenty-one years of age," the family does not terminate by the death of the testator and his widow, so as to relieve the executor from his obligation. (pp. 919, 923.)

J., J. L., and R. Bumgardner, for the appellant.

Curry & Glenn, for the appellee.

⁶⁶³ **KEITH, P.** Noah Miller died in December, 1895, leaving a will, which is as follows:

"I, Noah Miller, being of sound mind and disposing memory, and knowing the uncertainty of human life, do make and declare this my last will and testament, revoking all others, in manner and form as follows, to wit:

"1. I appoint my brother, Joseph Miller, as the executor of this my last will and testament.

"2. I will and direct that my said executor shall dispose of all the surplus hay and grain, if any on hand, and apply the proceeds thereof to paying my part of just debts as soon after my decease as he can.

"3. I direct that my executor shall take proper care of Lottie Bowen, supplying her with comfortable wearing apparel, food, etc., as long as she remains a member of my family, or until she becomes to be twenty-one years of age. I desire to be distinctly understood that her support shall cease as soon as she arrives at the age of twenty-one years.

"4. I will and bequeath to my beloved wife, Christiana Miller, my entire interest in my real estate and also in my personal property as long as she remains my unmarried widow, or until her decease, should that occur before she marries; should she marry, then she forfeits her entire interest to the property, and after her death or marriage the entire property, both real and personal, reverts to my brother, Joseph Miller. I desire to be understood that my brother, Joseph Miller, is to manage the business on the farm just as it has been done during my natural life.

"In witness whereof I have hereunto set my hand and seal this the fourteenth day of December, 1895.

"NOAH MILLER. [Seal]"

664 Some time in 1898 his widow, Christiana Miller, died, and Joseph Miller, the testator's brother and executor, became entitled to the whole estate of Noah Miller, real and personal, in accordance with the terms of the will.

A short time before the death of Mrs. Miller, Lottie Bowen, who is named in the will of Noah Miller, by her father, as next friend, filed her bill in chancery to have her rights under the will of Noah Miller ascertained.

The administrator of the widow, Christiana Miller, also brought a chancery suit against Joseph Miller and others, and Lottie Bowen also brought an action of trover against Joseph Miller for the recovery of a horse. The last-named case seems by consent to have been heard along with the chancery suits. The commissioner in chancery makes one report covering all

three cases, and they are all disposed of in the decree appealed from, which decides that Lottie Bowen is not entitled to recover the horse for which she sued at law; and that Christiana Miller's administrator do recover of Joseph Miller, executor, the sum of one hundred and forty-four dollars and ten cents, with interest from July 10, 1898.

The controversy as to the ownership of the horse and the decree in favor of Christiana Miller's administrator are below the jurisdiction of this court. The subjects involved in these suits have no connection with each other, nor with the suit of Lottie Bowen brought to establish her rights under the will of Noah Miller. They were heard together, and disposed of by the same decree from motives of convenience and economy, and with these observations we shall dismiss them from further consideration.

The principal suit presents questions of interest, by no means easy of solution.

Lottie Bowen came when a child of tender years to live in the family of Noah Miller, who seems to have treated her with kindness and affection. In his will he directs his executor to take proper care of her, "supplying her with comfortable wearing ^{and} apparel, food, etc., as long as she remains a member of my family, or until she becomes to be twenty-one years of age." About three years after the death of the testator she went upon a visit to her father, in Albemarle county, and upon her return with her father, after an absence of a few weeks, Joseph Miller refused to receive her, stating that her father could take better care of her than he could. During her absence Christiana Miller died, and under the terms of Noah Miller's will his whole estate, real and personal, had passed to his brother, Joseph. The commissioner to whom the case was referred finds that neither Lottie nor her father ever abandoned or renounced the provision made for her in the will, and that Lottie was entitled to recover the sum of ten dollars per month from the death of Mrs. Miller until she becomes twenty-one years of age, and the court decreed accordingly.

We do not think the evidence shows any act upon the part of Lottie Bowen which should defeat or impair her right to recover. It is true that the provision is made for her as long as she remains a "member of my family," and it may be that if she married or refused to remain a member of the family, and her father had failed or declined to exercise his parental authority to induce her to return, or had forbidden her

to return, the executor might well have taken the position that he was ready to comply with the will, and to provide for her as a member of the family, but that he was under no obligation to commute her clothing and support into a money equivalent. But no such case is presented. This girl, with the consent of Joseph Miller and Christiana Miller, went upon a visit to her father. After a few weeks she was willing to return, and her father showed his approval of her return by going with her. Joseph Miller, who had become vested with his brother's whole estate, and charged with Lottie's maintenance, refused to receive her. He seeks now to justify his conduct by the interpretation which he asks the court to place upon the will of Noah Miller.

¶ We agree with counsel for appellant that the question to be decided is, "How long is the executor required under the will to continue to provide for Lottie?" that it is only by virtue of the directions given to him by the will that the executor owes any duty to her, and that we must endeavor to ascertain from the will itself the intent of the testator upon this point.

It is clear that the provision is to terminate when the beneficiary attains the age of twenty-one years. It seems that the testator expected that Lottie should continue after his death to remain with, and be provided for as a member of, his family, but it is not reasonable to suppose that he meant that her support should be withdrawn upon her ceasing to be a member of his family, if the cessation of that relation was brought about without fault on her part, but by the arbitrary act of his brother, who thereby relieved himself of a burden upon the estate bequeathed to him. When the will was written, the family of Noah Miller consisted of himself, his wife, his brother, and Lottie Bowen. He, of course, did not intend that the provision for Lottie should end when the family as then constituted ceased to be. It could not come into existence under his will until after his death, and upon his death, in literal strictness, "his" family passed out of existence. Did it cease upon the death of his widow? We think not. When the testator uses the term "my family" he is speaking of a conception in his own mind—an entity so to speak—different from and independent of the units of which it was composed. He could not have intended doing, on so solemn an occasion, the vain thing of making a provision which should be dependent upon the continuance of his family as it was then composed;

and it clearly appears from his will that he contemplated that the support provided might continue for a number of years, and was to be unconditionally determined only when Lottie reached the age of twenty-one years. Within that time he must have known that death would not improbably still further diminish the family circle from which he was ⁶⁶⁷ shortly to disappear. Had he foreseen the death of his wife, can we believe that he would have regarded it as the total extinction of his family, and as the event which was to terminate his bounty? His wife might have survived until Lottie became twenty-one years of age, or might have died immediately, and in fact did die within three years after the execution of the will. Why should the bounty to Lottie end with the death of his wife? It was in no degree made dependent upon services rendered, or to be rendered by her to his wife, or to anyone else. It was a spontaneous benefaction which he contemplated might continue until she became twenty-one years of age, but was to cease unconditionally at that time. Nor do we think, for like reasons, that the death of Joseph Miller would affect Lottie's right.

We are of opinion that there is no error in the decree of the circuit court. It may happen, however, that from some supervenient cause the provision made in the will may be forfeited, and to provide for such a contingency the decree will be amended by reserving leave for any party to apply for any relief to which he or she may be entitled, and, as amended, affirmed.

In Construing a Will, the intention of the testator must control: *Westcott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18; and this must be ascertained from the words thereof in the light of all surrounding circumstances: *In re Douges' Estate*, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786. These rules apply in interpreting the word "family" as used in a will: See the monographic note to *Wade v. Jones*, 61 Am. Dec. 569.

MILLER v. BLACK ROCK SPRINGS IMPROVEMENT CO.

[89 Va. 747, 40 S. E. 27.]

PLEADING.—IF NO DISPOSITION SEEMS TO HAVE BEEN MADE OF A DEMURRER to a bill, it is to be regarded as overruled. (p. 925.)

SUBSURFACE WATERS WHICH HAVE NO DEFINITE CHANNEL belong to the realty where found, and are not subject to the law governing riparian rights. (pp. 929, 931.)

SUBSURFACE WATERS CAN BE THE SUBJECT OF RIPARIAN RIGHTS only when flowing in known or defined channels. (p. 931.)

PERCOLATING WATERS.—IF ONE DIGS A DITCH on his land which interrupts the percolating waters supplying his neighbor's spring, the latter has no cause of action therefor. (pp. 929, 934.)

SUBSURFACE WATERS.—ONE IS ENTITLED TO A REASONABLE USE of a well-defined subsurface stream flowing through his land, though it supplies a spring of his neighbor. (p. 934.)

Grattan & Grattan and J. A. Glasgow, for the appellant.

Patrick & Gordon, for the appellee.

748 CARDWELL, J. The bill in this case, filed by appellee, a corporation and the complainant in the court below, alleges that it and the defendant below, appellant here, are the owners of two adjoining tracts of land lying on the slope of the Blue Ridge mountains, near the dividing line between the counties of Rockingham and Augusta, the property of each being used as a summer resort or watering place; that soon after appellee was incorporated and purchased its tract of land, a question arose between it and appellant as to the ownership of two springs, the smaller one a mineral spring, situated near the dividing line between the two properties; that litigation was the result of this controversy, and it was finally decided that the springs were upon the land of appellee, and appellant was restrained by injunction, in 1893, from using the water from the springs, etc.; and that thereafter appellant made several fruitless efforts to secure the use of these waters for his boarding-house and his guests. The bill then concludes as follows: "Finding that he had finally to give up the use of these waters by open means above the surface, Miller [appellant] has recently undertaken to tap the springs by a ditch along close to the line between the two properties, which digging has been done in the county of Augusta. By this means he has crossed

the sources of one of the springs and turned it into the ditch he has dug and carried it down to his own property. So much so that the spring has almost entirely ceased to flow, and your orator is advised that he is going ⁷⁴⁹ on in his search for the other one. This is not only an invasion of your orator's property rights in the diversion of water whose natural flow is on the lands of the orator's property, as it is at present used, but an almost absolute destruction of its value for any purpose if this water is allowed to be taken away. The injury thus worked to your orator would be irreparable," etc. The prayer is for an injunction to restrain appellant, his agent, etc., "from digging on his own land so as to strike the sources of the springs which rise on appellee's land, or from in any way reducing the flow of the water that would naturally flow out at the springs, or from in any way interfering with appellee's use of said water, whether above or below the ground; that he [appellant] may be required peremptorily at once, and if he does not do so promptly, that the complainant may be permitted to go on his premises and fill in the ditch that he has already dug, so as to restore said stream, if it can possibly be done, to its natural flow," etc.

Appellant demurred to and answered the bill, and in his answer admits the former litigation concerning the spring in question, resulting in an injunction restraining him from using the water therefrom, and that he did dig upon his own land to obtain water, but claims that he was simply doing what he had a perfect right to do; that he was not seeking to cut off the sources of any spring on appellee's land; that he did not know and could not tell where the water which flowed from appellee's spring came from, but if it be true, as such appellee infers, that it comes from appellant's land, he will certainly be allowed a reasonable use of waters flowing through his land, whether above or below the surface, etc. He further claims that he does not know, neither can anyone say, where are the sources of these springs other than the springs themselves, and that the digging he did on his own land was not done to vex appellee, or with malice and intent to injure its property, but was simply done ⁷⁵⁰ in the exercise of his lawful rights on his own soil, in order to procure water for his own use.

No disposition seems to have been made of the demurrer to the bill, and it is to be regarded as overruled (*Miller v. Miller*,

92 Va. 196, 23 S. E. 232), but this does not constitute error, as the bill upon its face states a case for equity jurisdiction.

Upon hearing the cause upon the bill and answer and the depositions of witnesses, the circuit court, being of opinion that the nature and extent of the digging complained of in the bill was not plainly shown by the evidence, ordered that the complainant (appellee) take further evidence on this point. Whereupon, only the deposition of C. S. Patterson, president of the appellee company, who had twice before testified in the cause was taken, and upon a final hearing the decree appealed from was made, perpetuating the temporary injunction.

A great number of cases have been considered by this court involving the correlative rights of adjoining owners of land in reference to running streams on the surface, but the question presented in this case has not heretofore been considered.

In *Frazier v. Brown*, 12 Ohio St. 294, the facts were almost identical with those appearing in this record, and in an able and exhaustive opinion, concurred in by the entire court, it was held: 1. That in the absence of express contract and positive legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtering through the earth; hence, where a land owner digs a "hole" on his own land for purposes connected with the use of his own land, thereby cutting off or diverting underground waters which have always been accustomed to percolate or ooze through his land to the land of an adjoining proprietor, and there form the source of a spring or rivulet, any damage thereby occasioned to such adjoining proprietor is *damnum absque injuria*; 2. The act, to wit, the use of his own property, being lawful in itself, the motive with which the act was done is a matter of indifference.

⁷³¹ The question was left open in that case whether it would have made any difference in law if the "hole" had been dug from motives of unmixed malice, and was designed for no purpose of either ornament or use.

A large number of cases are to be found, and some of them are cited for appellee, in which it was held that an owner of an adjoining tract of land by digging thereon cannot divert the water from his neighbor's spring or well, if the digging is done with malice, or with the intent to deprive his neighbor of the water, but they have no application to this case, as it is neither alleged nor proved that the acts of the appellant were

done either maliciously or with intent only to deprive appellee of the flow of water to its spring.

The opinion in *Frazier v. Brown*, 12 Ohio St. 294, says: "In considering the relative rights and obligations of owners of adjoining lands in respect to water passing from the lands of one to those of the other, the subject naturally divides itself into four branches of inquiry, and this on account of the four different modes in which water may, and sometimes does, pass from one tract to another: 1. In respect to surface streams, which flow in a permanent, distinct, and well-defined channel from the lands of one owner to those of another; 2. In respect to surface waters—however originating—which, without any distinct or well-defined channel, by attraction, gravitation, or otherwise, are shed and pass from the lands of one proprietor to those of another; 3. Subterranean streams which flow in a permanent, distinct, and well-defined channel from the lands of one to those of another proprietor; 4. Subsurface waters which, without any permanent, distinct, or definite channel, percolating in mere veins, ooze or filter from the lands of one owner to the lands of another. The whole subject, in all of its branches, is governed by two ⁷⁵² general and fundamental maxims, which are: 1. That the estate, usufruct, and dominion of the owner of lands extends from the sky to the lowest depths of the earth; 2. That every man shall so use his own as not to injure his neighbor. These maxims, however, like most general rules, are in their application subject to modifications or exceptions, growing out of certain great principles of natural right, anterior in their origin, and superior in their obligation, to all individual proprietorship, out of certain paramount considerations of public policy, and from the established principles that, however great or obvious the damage may be, the law will regard as an injury that only which contravenes or interferes with a recognized right."

In the case before us we are only concerned with the fourth branch of inquiry mentioned above, to wit: Subsurface water, which, without any permanent, distinct or definite channel, percolate in mere veins, ooze, or filter from the lands of another.

The bill does allege that there are two springs upon appellee's land supplied with water coming from appellant's land, and which are in fact the only value that the property of appellee has, so that to be in any way deprived of these springs would be practically to be deprived of the property, but as we

have already seen, it is not alleged that the water, the obstruction and detention or diversion of which is complained of, reaches appellee's lands from the lands of appellant in any distinct, definite, or known channel, either above or below the surface.

What, then, is the proof as to the character of the supply of water to the spring alleged to have been destroyed or injured by the acts of appellant?

Much testimony was introduced for appellee to show the conduct of appellant in attempting to obtain the use of the water from the springs, and as to the digging of the ditch along or near the dividing line between the two properties, and its effect upon the smaller of the springs, which is situated about fifteen or ⁷⁵³ sixteen feet from the dividing line, but very little testimony as to the character of the supply of water to the spring. Instead of showing that the supply of water to the spring is through a distinct, definite, or known channel, the reverse is the effect of the testimony.

C. S. Patterson, president of the appellee company, testifying in its behalf, describes the premises and the ditch dug by appellant, and both he and other witnesses say that the water in the smaller of the springs was so reduced and lowered by the digging of the ditch and the gathering of the water in it, that the water would not run out of the spring. The ditch is described as beginning with the top of the ground and running into the slope of the mountain thirty feet, and of a depth of from eight to ten feet, where it stops above the spring. The witness (Patterson) was asked if the water came into the ditch at the point where it stopped, and his answer was: "The water came in along the side and continued on as far as he dug the ditch." This is practically all the testimony in the record as to the character of the supply of water to the spring in question.

The appellant in his answer says that he dug upon his own land to obtain water; that he was simply doing what he had a perfect right to do; that he was not seeking to cut off the sources of any spring on appellee's land; that he did not know and could not tell where the water which flowed from appellee's spring came from, but if it be true, as inferred by appellee, that it came from appellant's land, he would certainly be allowed a reasonable use of it, etc. In his deposition he says that he started the digging upon his own land with the view of putting in a pair of steps, but after going

in a few feet he struck water, and concluded to open up a spring. That when he discovered there was a prospect for water at that point and began to open it up, he had no intention whatever of cutting the sources of appellee's springs, as he did not know where the sources of the springs were, nor did he intend to injure appellee in any way, ⁷⁵⁴ but only intended to add to the value of his own property and to his own comfort.

There is testimony for appellee tending to show that appellant's statement as to why he began the digging on his land was untrue; that there was bad feeling between the parties, and that appellant was actuated by malice in digging the ditch; but it is, we think, irrelevant. The simple question made by the pleading is, Did appellant have a lawful right to do what appellee complains of?

Cooley, in his work on Torts, second edition, 689, says: "If one by excavation on his own land draws off the subterraneous waters from the lands of his neighbor to the prejudice of the latter, no action will lie for the consequent damages. This is fully settled in England by the leading case of *Acton v. Blundell*, 12 Mees. & W. 324, and in a later case it is decided that prescriptive rights cannot be gained in subterraneous waters, which will preclude such excavations on adjoining grounds as may draw them off. These decisions have been generally followed in this country, and it may be considered settled law that if the well dug by one man ruins the well or spring of his neighbor by drawing off its water, it is *damnum absque injuria*. Probably if the subterraneous water were a stream flowing in a well-known course it would be different, and one through whose land it flowed would be protected against its being drawn away from him. But one claiming rights in such a stream would be under the necessity of proving its existence and tracing it; not an easy task in any case."

In Gould on Waters, third edition, section 280, it is said: "Water percolating through the ground and beneath the surface, either without a definite channel or in courses which are unknown and unascertainable, belongs to the realty into which it is found. The rule that a man may freely and absolutely use his property, so long as he does not directly invade that of his neighbor or consequently injure his clearly defined rights, is applicable to ⁷⁵⁵ the interruption of subsurface supplies of water or of a stream, and the damage resulting there-

from is not the subject of legal redress. The land owner may, therefore, make a ditch to drain his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so doing he interrupts the underground sources of a spring or well on his neighbor's land. The only remedy for the latter is to sink his own well deeper. He may take the water which would otherwise pass by natural percolation into the adjoining land, or draw off the water which may come by natural percolation from that land, and no adverse right to prevent the exercise of this privilege can be acquired by prescription."

Among the many authorities cited in support of the text just quoted is the case of *Wheatly v. Baugh*, relied on by appellee's counsel here and reported in 25 Pa. St. 528, and 64 Am. Dec. 721. It fully sustains the principles stated in the text and not the contention of appellee. It holds that the destruction of a spring depending for its supply in percolation from the land above, by use of the land above for mining or other lawful purposes, will not render the owner liable in damages to the owner of the lower land, whose spring is destroyed, unless the injury was occasioned by malice or negligence. In a note to the case (64 Am. Dec. 721) it is said: "Water percolating beneath the surface without a definite channel, or in courses which are unknown and unascertainable, is not subject to the settled law governing the rights of riparian owners. . . . Waters which thus appear not to be supplied by a definite flowing stream are presumed to be the result of the ordinary percolations of water in the soil, such a presumption being necessary to obviate the difficulty of determining whether the water flows in a channel. . . . Where percolating water is found, it belongs to the realty where it is found."

The rules of law stated in the note are sanctioned by all the ⁷⁵⁶ text-writers, and among the authorities cited in support of them are the leading cases of *Chasemore v. Richards*, 7 H. L. Cas. 349, *Dickenson v. Grand Junc. Canal Co.*, 7 Ex. 282, and *Acton v. Blundell*, 12 Mees. & W. 324.

In *Chasemore v. Richards*, 7 H. L. Cas. 349, it was said: "The principles which regulate the rights of owners of land in respect of water flowing in known and different channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels. Where, therefore, a land

owner and a mill owner, who had for above sixty years enjoyed the use of a stream which was chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining owner had dug on his own ground an extensive well, for the purpose of supplying the inhabitants of the district, many of whom had no title, as land owners, to the use of the water, the mill owner had no right of action, and the principle applies, although the water flows subterraneously in a channel which was, and by excavation could have been ascertained to be, definite, if the channel is not absolutely known."

The only difference in the application of the law to surface and subsurface streams is in ascertaining the character of the stream. If it does not appear that the waters which came to the surface are supplied by a definite flowing stream, they will be presumed to be formed by the ordinary percolations of water in the soil. A stream or watercourse consists of bed, banks, and water, and to maintain the right to a watercourse it must be made to appear that the water necessarily flows in a certain direction and by regular channel, with banks or side, and having a substantial existence, but it need not be shown that the water flows continually, as it may be dry at times: *Tampa Water Works v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262, 20 South. 780; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352.

In *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659, 40 Atl. 41, it is ⁷⁵⁷ held that a stream of water large enough to fill a five-eighths pipe running through a fissure or hole in the bedrock several feet below the surface of the ground, but not flowing in a well-defined channel underground, is to be deemed percolating water, which can be appropriated by the owner of the land without liability to the owner of a spring a short distance therefrom, into which some of the water has been accustomed to find its way: See, also, *Southern Pac. R. R. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, and authorities cited in footnote to that case.

Subterranean waters can only be the subject of riparian rights when flowing in defined or known channels. "Defined" means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge. "Known" means the knowledge, by reasonable inference, from existing and observed facts in the natural or pre-existing condition of the surface of the ground. "Known" in this rule

of law is not synonymous with "visible," nor is it restricted to knowledge derived from exposure of the channel by excavation. "Water percolating through the ground in no defined or visible channel is not a stream": 14 Mews E. C. L. 1955.

It was said by Lord Watson in *McNab v. Robertson* (1897), 1 App. Cas. 134: "The word 'stream,' in its primary and natural sense, denotes a body of water, having, as such body, a continuous flow in one direction. . . . I see no reason to doubt that subterraneous flow of water may in some circumstances possess the very characteristics of water running on the surface; but in my opinion water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a 'stream.'"

In *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352, it is said: "Water, whether ⁷⁵⁸ moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known and regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are so secret, changeable, and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules, as has been done with streams upon the surface. Priority of enjoyment does not, in like cases, abridge the natural rights of adjoining proprietors."

Another case in which the facts are very similar to the case at bar is *Trustees v. Youmans*, 50 Barb. 316, 45 N. Y. 362, 6 Am. Rep. 100. In that case the plaintiff owned land in which were two springs which supplied him with water. Adjacent to those, and situated upon a higher slope, was the defendant's land. One of the plaintiff's springs was close to the line of defendant's land; the other about two rods distant from it. The defendant, in order to procure water within his land for his own use, dug a trench therein along the lower border of his land, and in so doing diminished the quantity of water in plaintiff's springs by cutting off some of the underground sources of supply.

In opinions by two of the judges affirming the judgment of the lower court dismissing the plaintiff's complaint, nearly all the authorities bearing upon the question are reviewed, and

it was held that the weight of authority clearly sustained the right of the defendant to dig in his own land to obtain water for proper and necessary uses at his house and barn, even if by so doing he materially interfered with the natural flow of water from the springs issuing from the lands of the plaintiff adjoining the defendant's premises; that the question was not whether the plaintiff could maintain an action against the defendant for damages for negligence or want of due care in digging in his land close to the line of plaintiff's land, but was whether the defendant should be restrained from digging in his land, whatever ⁷⁵⁹ his object or motives were, to the injury of the plaintiff's springs. The opinion of Balcom, J., concludes: "If the defendant were liable for digging in his land for water, for domestic or agricultural purposes, near the line of the plaintiff's land, out of which these springs issue, because such digging materially lessened or prevented the flow of water from such springs, then he and all others would be liable for digging for a like proper purpose in their lands, though a half mile from plaintiff's springs, provided such digging would prevent the water issuing from such springs. Such a rule would create more vexation than it would do good, and it might become intolerable. The weight of authority is opposed to such a rule. The decisions in Campbell and Story's reports, *supra*, and the doctrine of Chancellor Walworth in *Smith v. Adams*, 6 Paige, 435, are overborne by the numerous opposing authorities I have cited."

Many of the authorities referred to above and a number of others are cited by Mr. Minor in support of the following text: "Upon considerations of policy, as well of natural right, subterranean streams, whose springs and sources are not known, are not governed by like principles as regulate those which flow over the surface, but they are held rather to fall within the doctrine which gives to the owner of the soil all that lies beneath it, whether it be solid rock, porous earth, or veins of water, so that he may dig therein and apply that which is found there to his own purpose, at his absolute will and pleasure; and if in the exercise of such rights he intercepts or draws off water collected from underground springs in his neighbor's well, the inconvenience of his neighbor falls within the description of *damnum absque injuria*, and is no ground for an action": 3 Minor's Institutes, 2d ed., 18.

In 27 American and English Encyclopedia of Law, at page 425, it is said: "The correlative rights of adjoining proprietors in reference to running streams, whether on the surface

or subterraneous, and the general principles relating thereto, have no application to undefined ⁷⁶⁰ subterranean waters, which are merely the result of natural and ordinary percolations through the soil; such waters are part of the land itself, and belong absolutely to the proprietor within his territory; and it has been well settled by a long and unbroken line of authority that a proprietor of land may dig a well upon his own premises, mine, drain it, or in any way change its natural condition, even though in so doing he may intercept or impede the natural underground percolations, the sources of supply of his neighbor's spring or water. He may as lawfully draw the natural percolations from his neighbor's land as prevent the percolations of his own well going into the well of his neighbor. Such underground waters are as much the property of the owners of the land as the ores, rocks, etc., beneath the soil." The text is supported by a great number of authorities cited.

In the well-reasoned opinion of Lewis, C. J., in *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, it is said: "When the filtrations are gathered into sufficient volume to have an appreciable value, and to flow in a clearly defined channel, it is generally possible to see it, and to avoid diverting it, without serious detriment to the owner of the land through which it flows. But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly, the law has never gone so far as to recognize in one man the right to convert another's farm to his own use, for the purposes of filter. Such a claim, if sustained, would amount to a total abrogation of the right of property. No man could dig a cellar or a well, or build a house on his own land, because these operations necessarily intercept the filtrations through the earth. Nor could he cut down the forest and clear his land for the purposes of husbandry, because the evaporation which would be caused by exposing the soil to the sun and air would inevitably diminish to some extent the supply of water which would otherwise filter through it. He could not ⁷⁶¹ overturn a furrow for agricultural purposes, because this would, partially, produce the same result. Even if this right were admitted to exist, the difficulty in ascertaining the fact of its violation, as well as the extent of it, would be insurmountable."

There is respectable authority, and several of the cases are cited for appellee, seemingly in conflict with those we have referred to above, but they are cases in which the facts and circumstances were very different from those in this case. They are cases in which the stream in question, though subterranean, was well defined, and came more properly under the rules of law applicable to surface water, or in which the acts complained of were done maliciously, or with the sole purpose on the part of one land owner to deprive another land owner, his neighbor, of the supply of water to his spring or well. In this case, if appellant had dug a well on his own land for the purpose of obtaining a supply of water for his own use, the result of which was to dry up the spring on appellee's land, it would not be contended that appellee would have had a cause of action against appellant for so doing. It is also unnecessary to cite authority for the proposition that if the supply of the spring in question is by a well-defined stream of water coming from the lands of appellant, though subsurface, he would be entitled to a reasonable use of the water on his own land.

The water did not come into the ditch dug by appellant in a stream of any size or character, but, according to appellee's principal witness: "The water came in along the side, and continued on as far as he dug the ditch." In other words, the water percolated or filtered into the ditch along its side its whole length—thirty feet. Whether, if it appeared that the supply of the spring was through a well-defined channel, which could have been preserved without detriment to appellant's property through which it flowed, as well as the question whether, if the interference with the sources of the spring was attributable to malice or negligence, are questions not before us.

⁷⁶² We are unable to see, from the evidence in the case, that appellant has been guilty of any act beyond the lawful use of his own property, and are, therefore, of opinion that the decree appealed from must be reversed and annulled, and this court will enter such decree as the circuit court ought to have entered, dismissing appellee's bill.

Subsurface Waters having no known or defined course form part of the realty with the absolute right of use and appropriation by the owner of the land: *Willow Creek Irr. Co. v. Michaelson*, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943; *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659, 40 Atl. 41. As to what are percolating waters and the rights and liabilities respecting them, see the extended notes to *Wheelock v. Jacobs*, 67 Am. St. Rep. 663-672; *Wheatley v. Baugh*, 64 Am. Dec. 721-730.

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10. ATTACHMENT BOND.—THE TERM "COSTS" in a statute providing for an undertaking in attachment conditioned that "if the defendant recover judgment, . . . the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment," means the costs of the action in which the attachment is issued, and is not limited by the phrase "by reason of the attachment." (Brown v. Tidrick, 754.)

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13. ATTACHMENT BOND.—THE COMPLAINT, IN AN ACTION on an undertaking in attachment, need not set out the proceedings in the attachment. (Brown v. Tidrick, 754.)

14. **GARNISHMENT—SITUS OF DEBT.**—A citizen of one state may garnish a foreign railroad company operating within that state for a debt due one of its employes for labor performed therein, although he is a citizen of another state. (*Kansas City etc. Ry. Co. v. Parker*, 205.)

15. **GARNISHMENT.—SITUS OF DEBT** for the purpose of garnishment is not only at the domicile of the debtor, but in any state in which the garnishee may be found, provided the law of that state permits the debtor to be garnished, and the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the state. (*Kansas City etc. Ry. Co. v. Parker*, 205.)

16. **GARNISHMENT.—COUNTIES ARE NOT SUBJECT TO GARNISHMENT.** (*Sherman v. Shobe*, 825.)

17. **GARNISHMENT.—A COUNTY CANNOT WAIVE ITS EXEMPTION** from garnishment. If such waiver is made, it must be by the defendant in the garnishment proceedings whose interest and right is involved. (*Sherman v. Shobe*, 825.)

18. **GARNISHMENT—COUNTIES.—EXEMPTION** from general creditors of money raised by taxation to pay current expenses of a city protects from garnishment indebtedness of a county to such city for expense paid by it in maintaining a quarantine made necessary by an epidemic. (*Sherman v. Shobe*, 825.)

19. **GARNISHMENT—COUNTIES.**—Surplus of general revenues of a county remaining after its current expenses have been paid is subject to the claim of a general creditor, but garnishment against the county is not the remedy to subject the fund to the payment of his debt. (*Sherman v. Shobe*, 825.)

See Exemptions.

ATTORNEY AND CLIENT.

THE AUTHORITY OF AN ATTORNEY TO BRING A SUIT and represent the plaintiff is sufficiently shown by his oath. (*Mobile Trans. Co. v. Mobile*, 143.)

BANKS AND BANKING.

1. **BANKS AND BANKING—HUSBAND'S MANAGEMENT OF WIFE'S MONEY.**—If a husband has deposited his wife's money in bank in her name with the understanding that he will draw it out by checks, the bank is authorized to pay it upon checks drawn by him. (*Coleman v. First Nat. Bank*, 871.)

2. **BANKS AND BANKING—HUSBAND'S RIGHT TO DEPOSIT AND CHECK OUT WIFE'S MONEY.**—If a husband is given the sole management of his wife's separate estate, he may deposit her money in bank in her name and draw it by checks signed in her name by him, and the bank need not ascertain that the money is being drawn for her use simply because the husband is intemperate or improvident. (*Coleman v. First Nat. Bank*, 871.)

3. **BANKING—MONEY COLLECTED BY A BANK FOR A GENERAL CUSTOMER**, with the understanding that it shall be passed to his account, belongs to the bank, and the relation of debtor and creditor is created. (*Plano Mfg. Co. v. Auld*, 769.)

4. **BANKING.—MONEY COLLECTED BY A BANK FOR A STRANGER** belongs to him and never becomes assets of the bank. It may be reclaimed by him to the exclusion of general creditors.

upon the insolvency of the bank, if a sufficient amount remains in its vault. (Plano Mfg. Co. v. Auld, 769.)

5. **BANKING.—IF THE MONEY COLLECTED FOR SEVERAL STRANGERS** by a bank and mingled with other funds exceeds the amount in its possession on its becoming insolvent, they are preferred creditors, each being entitled to a pro rata distribution. (Plano Mfg. Co. v. Auld, 769.)

6. **BANKING.—IF ONE FOR WHOM A BANK HAS COLLECTED** a note brings suit, upon the insolvency of the bank, to impress a trust upon the money in its possession, and obtains a partial satisfaction, he should not be allowed, in that proceeding, to participate as a general creditor to the extent of the unpaid balance. If he deems himself entitled to a portion of the remaining assets, there is nothing to prevent an application therefor. (Plano Mfg. Co. v. Auld, 769.)

7. **BANKS—INSOLVENT—RECEIVING DEPOSITS.**—A statute declaring that any officer or member of a bank or firm or corporation doing a banking or deposit business who, knowing of the insolvency of such bank, firm, or corporation, shall receive, or connive at receiving, any deposit therein, is guilty of a felony, applies to all persons, corporations, and associations receiving deposits of money. (State v. Easton, 389.)

8. **FRAUDULENT BANKING — INSOLVENT NATIONAL BANKS—DEPOSITS.**—A STATE STATUTE making it a felony for any officer of a bank to receive deposits therein, knowing that the bank is insolvent, is applicable to national banks. (State v. Easton, 389.)

9. **FRAUDULENT BANKING.—AN INDICTMENT** charging that the defendant was president of the bank known as the "First National Bank of Decorah" sufficiently shows that it was an incorporated national bank. (State v. Easton, 389.)

10. **FRAUDULENT BANKING—CHARGING TWO OFFENSES.** AN INDICTMENT charging a president of a bank with receiving deposits knowing of the bank's insolvency, and also with permitting and encouraging the deposits, charges but one offense, since it does not allege a permitting or encouraging of deposits to anyone but to himself. (State v. Easton, 389.)

BASTARDS.

See Benefit Society.

BENEFIT SOCIETY.

1. **BENEFIT SOCIETIES—BY-LAWS—SUICIDE "SANE OR INSANE."**—A by-law of a beneficial association providing that no benefit shall be paid on account of the death of a member from suicide while "sane or insane" within five years after his admission is valid and binding upon the member and his beneficiary. (Chambers v. Knights of Maccabees, 716.)

2. **BENEFIT SOCIETIES—AMENDMENT OF BY-LAWS.**—A member of a benefit society who stipulates as part of his contract of membership that he will comply with the laws of the order then in force, or that may thereafter be adopted, is bound by subsequent amendment to a by-law in force when he became a member. (Chambers v. Knights of Maccabees, 716.)

3. **BENEFIT SOCIETY.—AN ILLEGITIMATE CHILD** cannot be designated as a beneficiary in an association under a statute

limiting the beneficiaries to the husband, wife, children, and relatives of a member. (*Lavigne v. Ligue Des Patriotes*, 460.)

4. **BENEFIT SOCIETY—DEPENDENCY OF BENEFICIARY.**—THE ILLEGITIMATE CHILD of a man, to whose support he contributes nothing except in the sense that he pays his own board to its mother, is not "dependent" upon him so that he can name it as his beneficiary in a benefit association. (*Lavigne v. Ligue Des Patriotes*, 460.)

5. **PERSONS ENTERING MUTUAL BENEFIT SOCIETIES** are presumed to know the terms of the charter and by-laws under which they are organized. (*Kocher v. Supreme Council etc.*, 687.)

6. **OFFICERS OF MUTUAL BENEFIT SOCIETIES** cannot dispense with the terms and conditions of the association charter and by-laws, unless expressly authorized to do so. (*Kocher v. Supreme Council etc.*, 687.)

7. **THE OFFICERS OF A MUTUAL BENEFIT SOCIETY HAVE NO POWER TO WAIVE BY-LAWS** relating to the substance of the contract between an individual member and his associates in their corporate capacity. (*Kocher v. Supreme Council etc.*, 687.)

8. **THE CONSTITUTION IS THE FUNDAMENTAL LAW OF A MUTUAL BENEFIT SOCIETY** to which all who come within its operation must conform. (*Kocher v. Supreme Council etc.*, 687.)

9. **MUTUAL BENEFIT SOCIETIES—CUSTOM.**—Isolated instances are insufficient to prove a custom, and cannot be shown to overcome or change the express provisions of a contract of insurance. (*Kocher v. Supreme Council etc.*, 687.)

10. **INSURANCE—RELIGIOUS BENEFIT SOCIETIES—CONSTITUTIONAL LAW.**—Persons of any religious denomination may form a fraternal benefit insurance society, and by its laws limit its membership to persons of the same religious belief and suspend or expel a member for failure to observe a duty prescribed by the church and required by the law of the society. The requirement that the member must continue in good standing in the church to retain his membership in the society does not violate a constitutional guaranty that he shall have the right to worship according to the dictates of his own conscience. (*Franta v. Bohemian etc. Union*, 611.)

11. **INSURANCE—RELIGIOUS BENEFIT SOCIETIES.**—If persons of a particular religious faith prefer to be associated with those of that faith and desire to form a fraternal insurance benefit society composed alone of members who are in harmony with them on that subject, there is nothing in the law to forbid them, and a society so formed is in no sense a religious corporation, although its by-laws provide that to retain membership in the organization the member must have, and continue to have, good standing in the church and in the observance of its requirements. (*Franta v. Bohemian etc. Union*, 611.)

BERMUDA GRASS.

See Nuisance, 3, 4.

BICYCLES.

See Municipal Corporations, 11.

BILLS AND NOTES.

See Negotiable Instruments.

BOARD OF SUPERVISORS.

See Supervisors.

BONDS.

See Indemnity Bond; Suretyship.

BUILDING AND LOAN ASSOCIATION.

1. LOAN ASSOCIATION—PAYMENT OF MORTGAGE.—Though it is stipulated in a mortgage to a building and loan association that the monthly payments are not to go in reduction of the debt secured, yet if they are so applied by the mortgagee, instead of in payment of stock subscribed for in the association, and the mortgagor assents thereto, the application will be upheld. (Capital City Ins. Co. v. Jones, 152.)

2. BUILDING AND LOAN ASSOCIATIONS.—ON THE DEATH OF A BORROWING MEMBER of a building and loan association, all fines against him must cease and his accounts be settled as though there had been a voluntary payment and withdrawal. (Shahan v. Shahan, 68.)

CARRIERS.

1. CARRIERS—PASSENGERS, WHO ARE.—A person who enters a train which he should have known did not stop at the station of his destination, but which he hoped would stop there and to which he has a ticket, but who refuses to pay fare to the next stopping place is a passenger within the meaning of a statute providing that if a passenger shall refuse to pay his fare he may be put off the cars "at any usual stopping place," and he is entitled to damages for being ejected from the train at any other place. (St. Louis etc. Ry. Co. v. Harper, 190.)

2. CARRIERS—ASSAULT BY DISORDERLY PERSON—LIABILITY FOR.—If there is danger of any passenger on a railroad train, street-car, or other means of transportation, being assaulted and injured by a disorderly passenger or stranger, and the employes of the carrier fail to remove, subdue, or overpower such turbulent person, having the means to do so, after knowing that there is such danger, or after they ought to have known it if they had exercised proper care, they are guilty of negligence, for the consequences of which the carrier is liable. It is not the peril which a particular individual is in that is to be considered in such case, as it is the duty of the carrier to protect all of his passengers. (United Railways etc. Co. v. Deane, 453.)

3. CARRIERS—LIABILITY FOR ASSAULT ON PASSENGER BY DISORDERLY PERSON.—If a drunk and disorderly person after assaulting a passenger is ejected from a street-car, it is the plain duty of the employes who put him off to have kept him off, they having demonstrated their ability to do so, and if he is permitted to again board the car and then assaults another passenger, the employes are guilty of negligence causing the injury, for which the carrier is liable. (United Railways etc. Co. v. Deane, 453.)

See Railroads.

CHARACTER.

See Evidence, 11b.

CHATTEL MORTGAGES.

1. **A CHATTEL MORTGAGE OF GROWING GRAIN DESCRIBING** it as a certain number of acres of wheat in the possession of the mortgagor in a certain county of the state, without naming the township or section, is insufficient to impart constructive notice. And this although the residence of the mortgagor is described with particularity. (Commercial State Bank v. Interstate Elev. Co., 760.)

2. **IN A CHATTEL MORTGAGE OF GROWING GRAIN, A PARTICULAR DESCRIPTION** of the land upon which it is to be grown is necessary. The rule that a mortgage of personalty is sufficient if it is such that a person aided only and directed by such inquiry as the instrument itself suggests is able to identify the property, has little application to grain. (Commercial State Bank v. Interstate Elev. Co., 760.)

3. **CHATTEL MORTGAGE—RECEIPT OF DELIVERY OF COPY.**—Under a statute requiring a delivery of a copy of a chattel mortgage to the mortgagor and a receipt of such delivery by him, the fact that the receipt is inserted in the body of the mortgage and signed before the execution of the mortgage, does not render the mortgage invalid. (Commercial State Bank v. Interstate Elev. Co., 760.)

CHOSE IN ACTION.

A CHOSE IN ACTION is the money, damages, or thing owing; the bond, note, or security is but the evidence of it. (First Nat. Bank v. Holland, 898.)

CITIZEN.

See Taxation, 2.

CODE AMENDMENT.

See Constitutional Law, 9-11.

CONFESSIONS.

See Evidence, 18-37.

CONFLICT OF LAWS.

1. **CONFLICT OF LAWS—PLACE OF CONTRACT.**—Although a court of one state will not apply to contracts made in another state, the law of that state, when such application is forbidden by the law to which the court owes obedience, still, in the absence of anything forbidding it, the contract must be governed by the law of the place where made and to be performed. (Fidelity Mut. etc. Assn. v. Harris, 818.)

2. **CONFLICT OF LAWS—PLACE OF CONTRACT.**—Contracts are governed by the law of the place where made, unless a different place is fixed thereby for their performance; and the place where made is the place where by acquiescence or final agreement of the minds of the parties the contract is concluded. (Fidelity Mut. etc. Assn. v. Harris, 813.)

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW—DISCRIMINATION AGAINST NEGROES.**—If a negro accused of crime, without pleading to the

indictment, files a motion to quash it on the ground that the grand jury was impaneled before the crime was alleged to have been committed, and that all negroes were excluded on account of their race and color, and offers witnesses to prove his allegations, the overruling of such motion, without hearing evidence as to the facts alleged, is a denial to the accused of the equal protection of the laws guaranteed to him by the constitution of the United States. (*Castleberry v. State*, 197.)

2. CONSTITUTIONAL LAW—REFERENDUM LEGISLATION.

A statute providing that whenever a petition is presented to the board of supervisors, signed by legal voters equal in number to fifty per centum of the votes cast at the last preceding election, asking that an ordinance set forth in the petition be submitted to the qualified voters in the county, such board must, by proclamation, submit such ordinance to the vote of the qualified voters, and that if a majority of the votes cast is in favor of the adoption of the ordinance, the board must proclaim that fact, and that the ordinance shall have the same effect as if adopted by the board of supervisors, is unconstitutional, especially if, under other provisions of the same statute, there is given the board of supervisors full power to make laws for the government of the county. There cannot be, for the same county, two equal, co-ordinate law-making powers, each existing without any restrictions the one upon the other. (*Ex parte Anderson*, 236.)

3. CONSTITUTIONAL LAW—STATE AND INDIVIDUAL ACTION.—THE FOURTEENTH AMENDMENT to the United States constitution relates to state action exclusively, and was designed as a protection against acts of the state and not the acts of persons. (*Bullock v. State*, 668.)

4. CONSTITUTIONAL LAW.—THE LEGISLATURE MAY CALL A LIABILITY INTO BEING where there was none before, if the circumstances are such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seems small. (*Danforth v. Groton Water Co.*, 495.)

5. CONSTITUTIONAL LAW.—ONE HAS NO VESTED RIGHT in a defense based upon an informality not affecting his substantial equities. (*Danforth v. Groton Water Co.*, 495.)

6. CONSTITUTIONAL LAW—VESTED RIGHT.—Where the right to damages from the exercise of eminent domain has been lost by neglect to observe a mere formality in procedure, a statute dispensing with such formality is not unconstitutional as to those who had a good defense at the time of its passage, though its secondary and incidental effect is to remove the bar of the statute of limitations. (*Danforth v. Groton Water Co.*, 495.)

7. CONSTITUTIONAL LAW.—THE GENERALITY OF THE TITLE TO A STATUTE is no objection, if it may comprehend the particulars of the body of the act, and the act must be upheld if the subject may be comprehended in the title. (*Mobile Trans. Co. v. Mobile*, 143.)

8. CONSTITUTIONAL LAW—TITLE OF STATUTE.—A statute entitled "An act granting to the city of Mobile the riparian rights in the river front," while the body of the statute grants the fee, does not offend the constitutional requirement that each law shall embrace but one subject which shall be described in its title. (*Mobile Trans. Co. v. Mobile*, 143.)

9. CONSTITUTIONAL LAW—REVISION AND REPUBLICATION—CODE AMENDMENTS.—A statute which in its title pur-

ports to be an act to revise a code of civil procedure by amending certain sections, repealing others, and adding certain new sections, and the body of which sets out in full all the sections amended or added, but none other, violates the constitutional provision that no law shall be revised or amended by reference to its title, but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended. (Lewis v. Dunne, 257.)

10. CONSTITUTIONAL LAW—STATUTE, REVISION OF, WHAT IS.—A statute is a revision if it amends four hundred sections, repeals nearly one hundred, changes the number of other sections, and adds new sections, as well as changes certain titles and chapter headings of a pre-existing code, and hence the whole of such code must be republished and re-enacted at length. (Lewis v. Dunne, 257.)

11. CONSTITUTIONAL LAW—CODE AMENDMENTS, SUBJECT OF, WHEN NOT SUFFICIENTLY EXPRESSED.—If the title of a statute is to the effect that it is to revise the code of civil procedure of a state by amending certain sections, repealing others, and adding certain new sections, such title expresses no subject whatever. (Lewis v. Dunne, 257.)

12. CONSTITUTIONAL LAW—CODE AMENDMENTS, WHEN INVOLVE MORE THAN ONE SUBJECT.—A statute which amends more than four hundred sections of the Code of Civil Procedure, repeals others, and adds new sections necessarily embraces more than one subject, and is for that reason unconstitutional and void, if the constitution of the state requires each statute to embrace but one subject. (Lewis v. Dunne, 257.)

13. UNCONSTITUTIONAL STATUTE—RECOVERY OF MONEYS PAID UNDER.—An executor or administrator paying fees to a county clerk pursuant to the provisions of a statute is not entitled to recover the moneys so paid upon the statute's being subsequently declared unconstitutional. (Wingerter v. San Francisco, 204.)

See Evidence, 38; Gambling Apparatus; Insane Persons; Interest; Municipal Corporations, 8-18; Taxation, 5-12; Witnesses, 3, 4.

CONTEMPT.

CONTEMPT—REFUSAL TO ANSWER QUESTIONS.—A witness who refuses to answer questions propounded to him by examiners in a contested election case, appears in court and answers a rule to show cause why he should not be committed for contempt, and refuses to obey an order made upon him to appear before such examiners and answer their questions, is guilty of contempt committed in open court. (In re Kelly's Contested Election, 719.)

CONTRACTS.

1. CONTRACT, CONSIDERATION FOR FORBEARANCE.—An agreement between a debtor and creditor that if the latter will wait until the death of the former, he shall then be well paid and also paid for waiting, is, if accepted and acted upon by the creditor, based upon sufficient consideration, and therefore valid. (Davis v. Teachout, 531.)

2. CONTRACTS IN RESTRAINT OF TRADE.—A contract by which a person agrees not to engage in a particular business within the state, "or anywhere else, where so doing may conflict with the business interests or diminish or lessen the profits" of the pur-

chaser, is null and void, and against public policy. (Union Strawboard Co. v. Bonfield, 346.)

3. **CONTRACTS IN PARTIAL RESTRAINT OF TRADE** are valid if founded upon a good consideration and if they afford only reasonable protection to the interests of the parties in whose favor the restraint is imposed, and the prohibited area is reasonable, so as not to be injurious to the interests of the public and against public policy. (Union Strawboard Co. v. Bonfield, 346.)

4. **CONTRACTS IN RESTRAINT OF TRADE.—IT IS AGAINST STATE POLICY** that its citizens shall not have the privilege of pursuing their lawful occupations at some place within its borders, and that a citizen shall be compelled to leave the state to engage in his business and to support himself and family. (Union Strawboard Co. v. Bonfield, 346.)

5. **CONTRACTS IN RESTRAINT OF TRADE MAY BE VALID** which embrace, within reasonable limits, parts of different states, but such contracts, when they apply to the whole state, are void and cannot be enforced. (Union Strawboard Co. v. Bonfield, 346.)

6. **A DEFENSE THAT A CONTRACT IS VOID OR VOIDABLE** must be specially pleaded. (Shawyer v. Chamberlain, 411.)

See Conflict of Laws.

CONVICT LABOR.

See Master and Servant, 9-12.

CORPORATIONS.

1. **CORPORATIONS—FRANCHISES—PRIORITY BETWEEN.** As between two corporations exercising similar franchises upon the same streets, priority carries superiority of right. Equity will adjust the conflicting interests as far as possible, and control both, so that each may exercise its own franchises as fully as is compatible with the necessary exercise of the other's, but if interference and limitation of one or the other are unavoidable, the later must give way, and the fact that it is under contract to the city to do work of a public nature does not alter its position or give it any claim to preference. (Edison Electric etc. Co. v. Merchants' etc. Power Co., 712.)

2. **CORPORATIONS—BY WHAT LAW GOVERNED.—**The rule that a corporation derives all of its powers from the law which creates it, and that its transactions, wherever they may occur, must be within the powers conferred by that law, relates only to the charter of the corporation, or to the law under which it is created, and by which its powers are defined, and not to general legislation of the state upon other subjects. A corporation created by the laws of another state does not bring into every state where it transacts business the general laws of the state of its creation. (Fidelity Mut. etc. Assn. v. Harris, 813.)

3. **THE LAW OF AGENCY APPLIES TO OFFICERS OF CORPORATIONS.** Hence, if any officer of a corporation is allowed to exercise general authority in respect to the business of the corporation for a considerable time, the corporation is bound by his acts in the same manner as if the authority was expressly granted. (Kocher v. Supreme Council etc., 687.)

4. **AGENCY.—THE RULE THAT CORPORATIONS ARE BOUND BY THE ACTS OF THEIR OFFICERS** who are held out as having power to perform such acts applies only to those who deal

in good faith with the officers, and who do not know, or are not bound to know, the limitations of their power. (*Kocher v. Supreme Council etc.*, 687.)

See Taxation, 1-6.

COSTS.

1. **APPEAL.—THE DENIAL OF A MOTION TO RETAX COSTS**, after the rendition of a judgment, will not be considered on appeal. (*Mobile Trans. Co. v. Mobile*, 143.)

2. **APPELLATE JURISDICTION—COSTS**.—Where an appellate court has jurisdiction only when the amount in controversy exceeds one hundred dollars, it cannot review an allowance for costs which does not amount to that sum. (*Shahan v. Shahan*, 68.)

See Attachment and Garnishment, 10.

COUNTIES.

See Attachment and Garnishment, 16-19; Supervisors.

COVENANTS.

1. **DEEDS—COVENANT RUNNING WITH LAND**.—A covenant in a deed by a railroad company for a right of way to "fence and keep such road fenced" is a covenant running with the land, and binding on the successor in title to the railroad company. (*Kelly v. Nypano R. R. Co.*, 715.)

2. **DEEDS — COVENANT RUNNING WITH LAND**.—No CHANGES IN TITLE, however brought about, can affect the liability of the party in possession during the period of his enjoyment, to perform the covenants of the first grantee, running with the land upon which the grant was made. (*Kelly v. Nypano R. R. Co.*, 715.)

3. **DEEDS—COVENANT AGAINST ENCUMBRANCE—PAROL EVIDENCE**.—Notwithstanding a covenant against encumbrances in a deed, it may be shown by parol evidence that it was agreed between the parties at the time of the conveyance, and as part of the consideration, that the covenantee should himself discharge a particular encumbrance. (*Johnson v. Elmen*, 845.)

4. **DEEDS—PAROL EVIDENCE**.—The effect of a deed, as a conveyance and as to its covenants, cannot be varied by parol proof. Thus, if there is a covenant against encumbrances, parol evidence is not admissible to show that a particular encumbrance was known to the covenantee, and was to be excepted from the operation of the covenant. (*Johnson v. Elmen*, 845.)

5. **COVENANTS OF SEISIN AND WARRANTY—BREACH OF**.—An eviction or ouster, either actual or constructive, is essential to a breach of covenants of seisin and warranty of title. (*Prestwood v. McGowin*, 136.)

6. **COVENANTS OF SEISIN.—IN DECLARING ON A BREACH** of a covenant of seisin, all that is necessary is to negative the words of the covenant generally. It is unnecessary to aver an eviction or ouster. (*Prestwood v. McGowin*, 136.)

7. **COVENANTS OF WARRANTY.—IN DECLARING ON A** covenant of warranty of title, it is not sufficient to negative the words of the covenant generally, but the complaint should contain separate counts and assignments for each of the breaches for which a recovery is sought. (*Prestwood v. McGowin*, 136.)

8. COVENANTS OF SEISIN AND WARRANTY—BREACH OF.—COVENANTS to the effect that the grantees, at the time covenants of seisin and warranty of title were entered into, found the premises in the adverse possession of parties claiming under a paramount title, and that they were held out of possession under such title existing at that time, are good averments of a breach of both such covenants. (Prestwood v. McGowin, 136.)

9. COVENANTS OF SEISIN AND WARRANTY.—THE MEASURE OF DAMAGES for the breach of covenants of seisin and warranty of title occurring at the time of the conveyance, is not the value of the land at such time, but the purchase money paid with interest and costs of suit. (Prestwood v. McGowin, 136.)

10. A COVENANT OF SEISIN DOES NOT RUN with the land, and is broken, if at all, as soon as it is made, and not by any future event. The breach can be taken advantage of only by the covenantee or his personal representative, and can neither pass to an heir, a devisee, nor a subsequent purchaser. (Prestwood v. McGowin, 136.)

11. COVENANTS OF WARRANTY OF TITLE ARE PROSPECTIVE in their character, run with the land, and are not broken until eviction. But a right of action for damages for such covenants does not pass with the land, if the grantee is dead at the time the covenants are broken, in which event his executor or administrator is alone entitled to sue. (Prestwood v. McGowin, 136.)

12. COVENANTS OF SEISIN AND WARRANTY—WHO MAY ENFORCE.—If covenants of warranty of title and of seisin are broken at the time of the conveyance, the grantees alone, and the personal representatives of such as have since died, and not their heirs are entitled to sue for damages for the breach. (Prestwood v. McGowin, 136.)

13. COVENANTS OF SEISIN AND WARRANTY—PARTIES IN ACTION FOR BREACH.—Where covenants of seisin and warranty of title are broken at the time of the conveyance, and two of the grantees, and the heirs of the others, bring an action for the breach, the heirs having no right to maintain the action, all must fail, though the evidence may sustain the action as to some. (Prestwood v. McGowin, 136.)

CRIMINAL LAW.

CONFLICT OF LAWS—CRIMES.—WHERE AN ACT IS AUTHORIZED TO BE DONE BY A LAW OF THE UNITED STATES, such act is thereby withdrawn from the operation of the criminal laws of a state, unless otherwise expressly provided by Congress. (State v. Easton, 389.)

CROPS.

See Chattel Mortgages, 1-3; Nuisance.

CUSTOM.

See Benefit Society, 2.

DAMAGES.

1. NEGLIGENCE—DAMAGES FOR FRIGHT.—NO RECOVERY can be had for injuries either to a person or an animal resulting from fright caused by the negligence of another, where no immediate personal injury is received. (Lee v. Burlington, 379.)

2. DAMAGES CANNOT BE RECOVERED FOR MERE FRIGHT OR MENTAL SHOCK, or the consequences thereof, unaccompanied by any immediate personal or physical injury and caused by unintentional negligence. (St. Louis etc. Ry. Co. v. Bragg, 208.)

3. DAMAGES—INTERVENING TORT.—IF A FIRST-CLASS BOILER-MAKER makes a boiler for a manufacturer to be used for certain purposes, and delivers it with a patent defect, he is liable to the manufacturer for the damages paid by the latter to his employés for injuries resulting from the defect, although the manufacturer was negligent in using the machine without inspection. (Boston Woven Hose etc. Co. v. Kendall, 478.)

4. DAMAGES—LETTERS PATENT AS EVIDENCE.—In an action against the maker of a boiler for damages arising from a defect therein, letters patent of a process of manufacturing in which the boiler was to be used are admissible in evidence as a foundation for testimony of the patentee that he notified the defendant of the use for which the boiler was wanted. (Boston Woven Hose etc. Co. v. Kendall, 478.)

5. DAMAGES—EVIDENCE OF SUBSEQUENT EXPERIMENTS.—In an action for damages from an explosion alleged to be due to a defective hinge to a boiler door, it may be shown that experiments two or three months later with a similar boiler, except the hinge, did not result in an explosion. (Boston Woven Hose etc. Co. v. Kendall, 478.)

See Railroads.

DEEDS.

1. UNRECORDED DEED—RECONVEYANCE—PRIORITY OF CREDITORS.—If a grantee fails to record his deed, and induces the grantor to reconvey to the grantee's wife, who assumes the purchase money notes originally given by her husband, the holders of these notes have priority over his judgment creditors seeking to subject the land. (Bankers' Loan etc. Co. v. Blair, 914.)

2. AN UNRECORDED DEED IS VOID as against creditors of the grantor. (Bankers' Loan etc. Co. v. Blair, 914.)

3. UNRECORDED DEED—RECONVEYANCE—GRANTOR'S CREDITORS.—If a grantee fails to record his deed, and induces the grantor to make a new deed to the grantee's wife, who with her husband executes a deed of trust on the property to secure a loan to pay the purchase money notes originally given by him and assumed by her, and both these deeds are recorded, creditors of the grantor cannot subject the property to judgments obtained against her subsequently to the recordation. (Bankers' Loan etc. Co. v. Blair, 914.)

4. CONVEYANCE, WHEN VOID.—IF A CONVEYANCE IS MADE BY A GRANTOR WHEN IN A DRUNKEN CONDITION, and while incapacitated for business, and is signed under the representation made to him by the grantee and others that it is a letter, it is not merely voidable, but is void. (Loftis v. Marshall, 286.)

See Alteration of Instruments; Covenants; Evidence, 2.

DEFINITIONS.

Domicile. (State v. Allen, 29.)

Easement. (Stokes v. Maxson, 367.)

Encumbrance. (Stokes v. Maxson, 367.)

Residence. (State v. Allen, 29.)

DIVORCE.

See Marriage and Divorce.

DOMICILE.

BETWEEN DOMICILE AND RESIDENCE THERE IS THIS DIFFERENCE. The one denotes a place of abode, whether temporary or permanent, and the other, a fixed permanent residence to which, when absent, one has the intention of returning. (*State v. Allen*, 29.)

DYING DECLARATIONS.

See Abortion, 2; Evidence, 17.

EASEMENTS.

1. AN EASEMENT IS A LIBERTY, PRIVILEGE, OR ADVANTAGE IN LAND without profit, existing distinct from the ownership of the soil. (*Stokes v. Maxson*, 367.)

2. EASEMENTS.—ABUTTING LOT OWNERS ON CITY STREETS have a right to easements of access, light, and air which cannot be taken for private use on any terms or under any conditions. (*Townsend v. Epstein*, 441.)

3. EASEMENT OF LIGHT AND AIR—INJUNCTION TO PRESERVE—ESTOPPEL.—An abutting lot owner on a city street has an easement of light and air from such street, and is entitled to an injunction to prevent the erection of a private structure which will deprive him of such easement, notwithstanding the fact that such structure is authorized by an ordinance made for the benefit of a private individual, as such ordinance is void. Nor does the fact that the lot owner did not object to the passage of the ordinance, nor make known his objections until the structure was nearly completed, estop him from obtaining the injunction. (*Townsend v. Epstein*, 441.)

4. IMPLIED EASEMENTS ARE LIMITED to such as are apparent, continuous, and necessary to the estate granted or retained. (*Walker v. Clifford*, 74.)

See Landlord and Tenant, 7, 8.

EJECTMENT.

1. EJECTMENT.—DEFENSES.—A person who purchases the same land from two different persons may, if sued in ejectment by a third person, rely on either or both of the titles he has purchased. (*Ford v. Harrison*, 192.)

2. EJECTMENT.—A CITY MAY RECOVER TRUST property in ejectment, and this when the land or a portion of it is servient to the flow of water or of navigation thereon. (*Mobile Trans. Co. v. Mobile*, 143.)

3. IN EJECTMENT TO RECOVER A TIDE WATER SHORE up to high-water mark, an instruction limiting the recovery to the present high-tide line, which may be different from what it was when the grant was made or the action commenced, is properly refused. (*Mobile Trans. Co. v. Mobile*, 143.)

4. EVIDENCE IN EJECTMENT.—PUBLIC STATUTES and grants are admissible in evidence in ejectment when they constitute the title papers of a party. (*Mobile Trans. Co. v. Mobile*, 143.)

ELECTIONS.

See Witnesses, 6.

ELECTRIC COMPANIES.

1. **NEGLIGENCE—DUTY AS TO ELECTRIC WIRES.**—A person or company using wires charged with an electric current is bound, while the public is not, not only to know the extent of the danger arising from them, but to use the very highest degree of care practicable to avoid injury to everyone who may lawfully be in proximity to such wires and liable to come accidentally or otherwise in contact with them. The duty is not only to make such wires safe by proper insulation, but also to keep them so by constant oversight and repair. (*Fitzgerald v. Edison Electric etc. Co.*, 732.)

2. **NEGLIGENCE—NOTICE OF DEFECTIVE INSULATION OF ELECTRIC WIRE.**—If recovery is sought against an electric light company for a death caused by a defectively insulated wire, plaintiff is not bound to show direct and express notice of the defect, but may show that it has existed for such a period of time that it ought to have been known to the company. (*Fitzgerald v. Edison Electric etc. Co.*, 732.)

3. **NEGLIGENCE—DEFECTIVE INSULATION OF ELECTRIC WIRES—EVIDENCE.**—If a person goes upon a roof in the lawful exercise of his business, and while so engaged is killed by a defectively insulated electric wire coming in contact with him, and it is shown that the insulation has been defective for some considerable time, the question of negligence is for the jury, but evidence that the wire had been put on the roof without the consent or against the protest of the owner of the house is not admissible to establish such negligence. (*Fitzgerald v. Edison Electric etc. Co.*, 732.)

EMINENT DOMAIN.

1. **EMINENT DOMAIN.—A TITLE FOUNDED UPON** a taking by the right of eminent domain is a new title. (*Emery v. Boston Terminal Co.*, 473.)

2. **EMINENT DOMAIN—VALUE OF LEASE.**—The fact that a lessor was in the habit of renewing the lease, and that he and the lessee were likely to keep on together, adds nothing to the legal rights of the lessee. Hence expert evidence as to an increase of the value of the lease from this source is properly excluded, in an action by the lessee for damages for the taking of the premises by right of eminent domain. (*Emery v. Boston Terminal Co.*, 473.)

3. **EMINENT DOMAIN — ELEMENTS OF DAMAGE TO LESSEE.**—Where a statute gives an owner three months to vacate premises taken for a public use, his lessee, whose lease does not expire until after such period, cannot recover for an interruption of his business by having to move, or for the expense of moving, or for a loss of fixtures, except as caused by having to move at an earlier day than the expiration of the lease. (*Emery v. Boston Terminal Co.*, 473.)

4. **EMINENT DOMAIN.—IF A LESSEE**, in an action for damages for the taking of the premises under the power of eminent domain, offers to show an oral extension of his lease, the respondent may take advantage of the statute of frauds without pleading it. (*Emery v. Boston Terminal Co.*, 473.)

See Constitutional Law, 6.

ENCUMBRANCE.

AN ENCUMBRANCE ON LAND is a right in a third person therein, to the diminution of the value of the land, though consistent with the passing of the fee by a deed of conveyance. (*Stokes v. Maxson*, 867.)

EQUITY.

1. EQUITY—EXTENT OF RELIEF.—WHEN EQUITY ACQUIRES JURISDICTION for any purpose, it will do complete justice between the parties, enforcing, if necessary, legal rights, and applying legal remedies. (*Vaught v. Meador*, 908.)

2. EQUITY JURISDICTION.—IT IS NO VIOLATION OF THE SOVEREIGNTY OF ONE STATE for a court of equity of another state to compel a party before it to do an act which, if done voluntarily anywhere, would not be such violation. (*Vaught v. Meador*, 908.)

See Forfeitures.

ESTATE OF DECEDENT.

See Executors and Administrators.

ESTOPPEL.

1. ESTOPPEL BY WAIVER.—If each party to a contract so acts as to justify the other in believing, and acting on the belief, that the effect of the failure to pay part of a debt when due is to be disregarded and the contract to stand as if there had been no default, a mutual estoppel by waiver as to the effect of such default is created. (*San Antonio etc. Assn. v. Stewart*, 864.)

2. EQUITABLE ESTOPPEL—ELEMENTS OF.—Neither affirmative acts or words, nor silence maintained with a fraudulent intent to deceive, is an indispensable element of equitable estoppel. (*Wampol v. Kountz*, 765.)

3. EQUITABLE ESTOPPEL.—THE TERM "CONDUCT," as used in relation to equitable estoppel, embraces not only ideas conveyed by words written or spoken and things actually done, but includes silence and omission to act. (*Wampol v. Kountz*, 765.)

4. ESTOPPEL TO SHOW FORGERY OF DEED.—One who suffers another to purchase land and expend money thereon in the belief that his grantor's title is perfect, when in fact the deed to such grantor was forged, will not be allowed to assert title after concealing his claim and the forgery for over thirteen years. (*Wampol v. Kountz*, 765.)

See Municipal Corporations, 3.

EVIDENCE.

1. SECONDARY EVIDENCE OF A WRITING VOLUNTARILY DESTROYED may be received, if it was destroyed when none of the parties thought it necessary to preserve it, and there is no suspicion of fraud against the party seeking to put it in evidence. (*Davis v. Teachout*, 581.)

2. EVIDENCE.—A TRANSCRIPT OF A CONVEYANCE is admissible in evidence only when it appears that the original conveyance has been lost or destroyed or that the party offering the transcript has not the custody or control thereof. (*Burgess v. Blake*, 78.)

3. **EVIDENCE.—A CONVERSATION OVER A TELEPHONE** is admissible in evidence, and the fact that its character is uncertain and easily manufactured merely affects the weight it should receive. (*Shawyer v. Chamberlain*, 411.)

4. **EVIDENCE—INVOICE—COST PRICE.**—The fact that a witness testifies as to an invoice of the cost price of goods will not preclude him from giving independent testimony of the wholesale cost. (*Shawyer v. Chamberlain*, 411.)

5. **EVIDENCE.—BOOKS OF A BANK**, kept under the supervision of the defendant, are admissible to show both the condition of the bank and the defendant's knowledge of such condition, although they may not be admissible as books of account. (*State v. Easton*, 389.)

6. **EVIDENCE OF THE VALUE OF NOTES** held by a bank are admissible for the purpose of showing the insolvent condition of the bank. (*State v. Easton*, 389.)

7. **EVIDENCE — X-RAY PLATES AND PICTURES.**—In an action for personal injuries, where the plaintiff puts in evidence X-ray pictures of his feet designated in pencil "right" and "left," the defendant may place in evidence the plate from which the pictures were taken, and pictures printed from it by an expert, and show that the foot marked "left" in the plaintiff's pictures, which his witness had testified showed an enlargement of the bone, was in fact the uninjured right foot. The fact that the plate had on it the letters "R" and "L," placed there since the plaintiff's pictures were printed, is not ground for excluding it. (*De Forge v. New York etc. R. R. Co.*, 464.)

8. **EVIDENCE—PHOTOGRAPHS—DISCRETION OF JUDGE.** In the introduction in evidence of X-ray plates and pictures the judge has discretion in the matter of their verification or authentication, but if this question is not involved, his exclusion of such evidence will sustain an exception. (*De Forge v. New York etc. R. R. Co.*, 464.)

9. **EVIDENCE — X-RAY PHOTOGRAPHS—VERIFICATION.**—While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted in evidence if properly taken. (*De Forge v. New York etc. R. R. Co.*, 464.)

10. **EVIDENCE—PAROL TO IDENTIFY THE SUBJECT OF CONTRACT.**—If a written contract provides for the sale of all peaches in "sundry orchards in Ontario and Cucamonga," parol evidence is admissible to identify the orchards contemplated by the parties to the contract. (*Ontario etc. Assn. v. Cutting etc. Co.*, 231.)

11. **APPELLATE PRACTICE — IMMATERIAL ERROR.**—The reception of oral evidence of an agreement between the parties at the time of executing a written contract limiting its effect is not prejudicial error, if the matter testified to relates only to conditions fairly implied from the written contract. (*Ontario etc. Assn. v. Cutting etc. Co.*, 231.)

11a. **CRIMINAL TRIAL—STRIKING OUT EVIDENCE.**—In order that no error can be assigned on the reception in a criminal case of illegal evidence, which is subsequently excluded, it should clearly appear that the testimony was so eradicated from the case that its admission could not have injuriously affected the accused. (*Bullock v. State*, 668.)

11b. **CRIMINAL TRIAL — EVIDENCE — CHARACTER.**—If a prisoner, on his trial, gives evidence that his character is good, the

prosecution may by way of reply prove that it was bad, but such evidence must be confined to general reputation, and specific acts cannot be shown. (Bullock v. State, 668.)

12. **EVIDENCE--OTHER CRIMES.**—On the trial of an accused for crime it is not competent to prove that he committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the indictment. (Bullock v. State, 668.)

13. **EVIDENCE OF OTHER TRANSACTIONS.**—IN CASES IN WHICH THE KNOWLEDGE, GOOD FAITH, MOTIVE OR INTENT of the party is material, evidence collateral to the main subject is sometimes admitted, but it is limited to facts which are so connected with the subject in controversy as to make it apparent that the party had a common purpose in both transactions. (Bullock v. State, 668.)

14. **EVIDENCE--RES GESTÆ.**—DECLARATIONS which emanate directly from the act under investigation and explain and illustrate it are admissible as part of the res gestæ, but mere narrations of a past event, or the declarations of a witness concerning such past event, giving his relations to it and his knowledge or opinion of it, made after the event is complete, and having no immediate connection with it, are not admissible as evidence to prove such event. (Elder v. State, 220.)

15. **EVIDENCE—RES GESTÆ.**—DECLARATIONS WHICH ARE THE RESULT OF AN AFTERTHOUGHT on the part of the declarant, made concerning a past event, are only hearsay and not competent evidence to prove the facts of such event. (Elder v. State, 220.)

16. **EVIDENCE IMPROPERLY ADMITTED** must be treated as prejudicial unless there is something to show that it is not. (Elder v. State, 220.)

17. **DYING DECLARATIONS ARE ADMISSIBLE IN EVIDENCE** although the indictment does not specifically charge either murder or manslaughter. (State v. Meyer, 634.)

18. **CONFESSION—INVOLUNTARY.**—Where officers search a prisoner, and then inform him that it will be easier for him if he tells all about the crime, a confession procured under such circumstances is involuntary and inadmissible in evidence. (Bullock v. State, 668.)

19. **A CONFESSION MADE BY A PRISONER TO AN OFFICER IN WHOSE CUSTODY HE IS** can be received in evidence only when it appears that it was voluntary. (Bullock v. State, 668.)

19a. **TO BE VOLUNTARY, A CONFESSION** must not be extorted by threats or obtained by any direct or implied promise relating to some benefit to be derived by the prisoner in the criminal prosecution. (Bullock v. State, 668.)

20. **THE GROUND ON WHICH AN INVOLUNTARY CONFESSION IS EXCLUDED** is that the accused may have been induced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth. (Bullock v. State, 668.)

21. **WHERE PROMISES OR THREATS HAVE BEEN ONCE USED TO OBTAIN AN INVOLUNTARY CONFESSION**, all subsequent admissions of the same or like facts will be rejected, unless from the circumstances there is good reason to presume that the hope or fear that influenced the first confession has been effectually dispelled. (Bullock v. State, 668.)

22. CONFESSIONS—IMPROPER INFLUENCE DISPELLED.—Where it appears to the satisfaction of the judge that the improper influence used to obtain a confession was totally done away with before a second confession was made, the latter is admissible in evidence. (Bullock v. State, 668.)

23. CONFESSION —VOLUNTARY — QUESTION OF FACT.—Whether a confession was made when the mind of the prisoner was laboring under, or was free from, the effects of a previous improper influence, presents a question of fact for the trial court. (Bullock v. State, 668.)

24. CONFESSION — VOLUNTARY — WHEN QUESTION FOR JURY.—Where there may be doubt from the whole evidence whether or not the confession was voluntary, the question should be left to the jury, with a direction to reject it, if they are satisfied it was not voluntary. (Bullock v. State, 668.)

25. CONFESSIONS WHICH ARE NOT VOLUNTARILY MADE, but are extorted through hope or fear caused by inducements held out to the prisoner, are not competent evidence against him. (State v. Storms, 380.)

26. CONFESSIONS, QUESTION OF LAW.—Whether a confession is voluntary or not is usually a question to be determined by the court. (State v. Storms, 380.)

27. CONFESSIONS — VOLUNTARY — WHEN QUESTION OF FACT.—Where there is a conflict of evidence, and the court is in doubt whether the confession is voluntary or not, the inquiry should be left to the jury with instructions to disregard the confession if it is not voluntary. (State v. Storms, 380.)

28. WHERE A CONFESSION APPEARS ON ITS FACE TO BE FREE AND VOLUNTARY, the burden is on the accused to show that it is incompetent. (State v. Storms, 380.)

29. WHERE A CONFESSION DOES NOT ON ITS FACE APPEAR TO BE FREE AND VOLUNTARY, and there is a general objection that it was made under promises, threats, or fear, the burden is on the state to show that it was freely made. (State v. Storms, 380.)

30. CONFESSIONS.—ADJURATION TO TELL THE TRUTH is not sufficient to justify the rejection of a confession. (State v. Storms, 380.)

31. THE FACT THAT A CONFESSION WAS INDUCED BY artifice, deception, or fraud is no ground for excluding it. (State v. Storms, 380.)

32. CONFESSIONS.—FEAR OF THE ULTIMATE CONSEQUENCES of a crime will not make a confession involuntary. (State v. Storms, 380.)

33. CONFESSIONS.—THE FACT THAT A PRISONER IS IN custody is not such undue influence or fear as will invalidate a confession. (State v. Storms, 380.)

34. IF A CONFESSION IS OBTAINED BY ANY SORT OF THREATS OR VIOLENCE, or by any direct or implied promises, however slight, or by the exertion of any improper influence, it is inadmissible in evidence. (State v. Storms, 380.)

35. THE FACT THAT A CONFESSION WAS MADE TO A PUBLIC OFFICER WHILE THE ACCUSED WAS UNDER ARREST, in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, though it may be considered in determining the question. (State v. Storms, 380.)

36. APPEAL—CONFESSIONS.—THE DETERMINATION OF A TRIAL JUDGE that a confession is voluntary will not be reviewed on appeal, unless there was manifest error. (State v. Storms, 380.)

37. CONFESSIONS—VOLUNTARY.—WHERE NO THREATS ARE MADE, and no promises or inducements held out, and the fear of the accused, if any, arose from other causes than the conduct of the officers having him in charge, a confession made is voluntary. (State v. Storms, 380.)

38. EVIDENCE—POWER TO CHANGE RULES OF.—There is no vested right in a rule of evidence, since it affects the remedy only, and is within the constitutional power of the legislature to change. (Burk v. Putnam, 372.)

See Homicide, 7; Witnesses.

EXECUTION.

1. EXECUTION SALE, WHAT NOT SUBJECT TO.—PROPERTY HELD IN TRUST cannot be subjected to the payment of a judgment against the trustee. (Farmers' Bank v. Gould, 24.)

2. EXECUTION SALES—MORTGAGED PREMISES—PURCHASE OF EQUITY IN PART.—The purchaser at an execution sale of the equity of redemption in one of two mortgaged tracts of land cannot buy in the mortgage and enforce it against the remaining tract, and where he attempts to do so by foreclosure of the mortgage against both tracts, the mortgagor retaining the equity of redemption in the unsold tract may proceed in equity to prevent such foreclosure upon tendering the pro rata share of the debt resting upon such unsold tract. (Parkey v. Veatch, 627.)

See Exemptions; Indemnity Bond.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—FINAL SETTLEMENT—NOTICE OF ORDER OF DISTRIBUTION.—If final settlement of an estate has been adjudged showing a balance in the hands of the executor for distribution, the order therefor follows as a natural consequence, and the executor, in contemplation of law, is in court for that purpose until the order is made. He is not entitled to notice that such order is to be made, and it may be made in his absence, and the unfulfilled promise of the court to notify him when the order would be made does not affect its validity. (State v. Henderson, 613.)

2. ESTATES OF DECEDENTS—SALE OF, WHEN SUBJECT TO LIENS.—The real property of a decedent, however subject to liens, may be sold by order of court, and the right of lienholders will be protected either by selling subject to their liens, or directing payment thereof to be made from the proceeds of the sale. (Shahan v. Shahan, 68.)

See Constitutional Law, 13; Judgments, 1, 7.

EXEMPTIONS.

1. EXEMPT PROPERTY.—CREDITORS CANNOT MAKE CLAIM TO PROPERTY that would have been exempt had it remained in the hands of the debtor. (Burk v. Putnam, 372.)

2. EXEMPTION—PROPERTY GIVEN TO WIFE.—CREDITORS cannot subject to the payment of their judgments property

in the name of the wife acquired by the husband's exempt earnings, given to her while they were exempt. (*Burk v. Putnam*, 372.)

3. EXECUTION—EXEMPTION, RIGHT OF, AT WHAT TIME TO BE DETERMINED.—When a judgment debtor, though a nonresident when his property is seized by attachment, returns to, and bona fide resumes his residence within, the state before the sale, he becomes entitled to his exemption rights in such property. (*State v. Allen*, 29.)

4. EXECUTION—EXEMPTION.—ONE IS A NONRESIDENT WITHIN THE MEANING OF THE EXEMPTION LAWS, though still within the state, if he has begun to remove therefrom with a fixed intent to leave it and to take up his residence in another state. A nonresident, within the meaning of the exemption laws, cannot be entitled to exemption on the ground that he is a resident. (*State v. Allen*, 29.)

See Attachment and Garnishment, 17, 18.

EXPERT EVIDENCE.

See Witnesses, 1.

FILING PAPERS.

1. THE FILING OF AN UNDERTAKING ON APPEAL MUST BE BY OFFERING IT TO THE CLERK AT HIS OFFICE, and the giving of it to that officer or his deputy at a place remote from his office and out of office hours, though he there marks it filed, is not a filing, nor can it become such on his depositing the paper in the proper place in his office on the next day, so as to relate to the time when it was so left with such officer. (*Hoyt v. Stark*, 246.)

2. A PAPER IS FILED ONLY when deposited with the proper clerk at his office. If such filing carries notice or affects private rights. (*Hoyt v. Stark*, 246.)

FIRE LIMITS.

See Injunctions, 7-9; Municipal Corporations, 1.

FORFEITURES.

1. EQUITY HAS JURISDICTION OF A SUIT to be relieved from the forfeiture of a lease. (*South Penn Oil Co. v. Edgell*, 43.)

2. FORFEITURE, RELIEF OF TENANT FROM.—A court of equity will often relieve a tenant from a forfeiture where his breach of the lease was not willful, and particularly when it was the result of accident or mistake. (*South Penn Oil Co. v. Edgell*, 43.)

3. FORFEITURE.—THAT A MISTAKE WAS NEGLIGENT does not deprive a tenant of the right to be relieved in equity from a forfeiture of his lease on account of a breach thereof due to such mistake. (*South Penn Oil Co. v. Edgell*, 43.)

4. FORFEITURE, RELIEF FROM.—WHERE A PENALTY OR FORFEITURE IS DESIGNED MERELY AS SECURITY TO ENFORCE THE PRINCIPAL OBLIGATION, equity will relieve against it. (*South Penn Oil Co. v. Edgell*, 43.)

5. FORFEITURE FOR BREACH OF LEASE, RELIEF FROM. If a gas and oil lease provides that the lessor may connect his service pipe with the gas line, and thereby supply a dwelling with gas during the continuance of the lease, and contains a clause providing for a forfeiture on a breach of any of its conditions or

covenants, and the pipe is disconnected and the right to maintain it denied by the officers of the lessee, because of their neglect in not informing themselves of the contents of the lease, equity may, nevertheless, relieve from the forfeiture. (*South Penn Oil Co. v. Edgell*, 43.)

FORGERY.

See Estoppel, 4.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT BANKING.

See Banks and Banking, 7-10.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT TRANSFERS—VOLUNTARY CONVEYANCE, WHAT IS NOT WITHIN THE MEANING OF THE LAW AGAINST.**—One who receives a conveyance for the purpose of delaying or defrauding creditors of the grantor is not guilty of making a voluntary conveyance, if he reconveys the property to such grantor. (*Farmers' Bank v. Gould*, 24.)

2. **FRAUDULENT TRANSFER.—THE CREDITORS OF THE GRANTEE OF CONVEYANCE, MADE IN FRAUD OF CREDITORS** have no right, where they have not acquired any lien, nor given credit on their faith in his ownership of the property, to insist on his retaining such property, and hence cannot assail his reconveyance thereof to the grantor, as a fraud upon them. (*Farmers' Bank v. Gould*, 24.)

3. **FRAUDULENT CONVEYANCES—ESTOPPEL AGAINST WIFE.**—If a wife for a great number of years permits her husband to retain title to her land without objection, knowing that his creditors are dealing with him under the belief that it belongs to him, she is estopped, as to them, to claim the land as hers, and a conveyance by her husband to her to prevent the seizure of the land by such creditors is fraudulent and void. (*Cowling v. Hill*, 200.)

See Homesteads, 3, 4.

FRIGHT.

See Damages, 1, 2.

GAMBLING APPARATUS.

1. **POLICE POWER—SUMMARY SEIZURE OF GAMBLING IMPLEMENTS—DUE PROCESS OF LAW.**—A machine, instrument, or implement, admitted to be incapable of being put to any legitimate use and designed and intended to be used for violating the gambling laws of the state, is an instrument *malum in se*, hurtful in character to the public peace and morals, and as such is subject to summary seizure and detention under the police power of the state. No action will lie for the recovery of such instrument when thus seized and detained, nor is anyone deprived of his property without due process of law by such seizure. (*Board of Police Commrs. v. Wagner*, 423.)

2. **CONSTITUTIONAL LAW—TRIAL BY JURY—DESTRUCTION OF GAMBLING APPARATUS.**—Trial by jury is not a right in summary proceedings, and no constitutional right is violated by providing that gambling implements and apparatus shall be destroyed, after a summary hearing, under the direction of the court. (Frost v. People, 352.)

3. **CONSTITUTIONAL LAW—DESTRUCTION OF GAMBLING APPARATUS.**—A statute providing for searches and seizures of gambling apparatus or implements, and that the thing seized shall be burned or otherwise destroyed under the direction of the court, does not violate any constitutional right or deprive anyone of property without due process of law. (Frost v. People, 352.)

4. **CONSTITUTIONAL LAW—SEIZURE AND DESTRUCTION OF GAMBLING APPARATUS—PROPERTY RIGHTS.**—If a statute declares that gambling implements and apparatus are pernicious and dangerous to the public welfare and that the keeping of them is a criminal offense, they are not thereafter lawful subjects of property which the law protects, and are liable to seizure and destruction without violating any constitutional rights of property, whether they are in use when seized or not. (Frost v. People, 352.)

GARNISHMENT.

See Attachment and Garnishment.

GIFTS.

1. **GIFT OF STOCK TO WIFE—SUBSEQUENT ACTS NOT AFFECTING.**—A gift of bank stock from a husband to his wife is not affected by a mention of the stock in his subsequent will and deed of trust, nor by the payment of dividends to him, the stock continuing to stand in his name. (First Nat. Bank v. Holland, 898.)

2. **GIFT TO WIFE.—DECLARATIONS OF A HUSBAND.** free from debt at the time they are made, are admissible to prove a gift to his wife. (First Nat. Bank v. Holland, 898.)

3. **GIFT OF STOCK TO WIFE—WHEN COMPLETE.**—The delivery of a certificate of bank stock by a husband to his wife with intent to transfer title by way of gift is effectual as an equitable assignment, although no legal title passes for want of indorsement on the certificate, or transfer on the books of the bank. (First Nat. Bank v. Holland, 898.)

4. **GIFTS.—THE WORDS "GOODS AND CHATTELS,"** used in a statute relating to gifts, do not include "choses in action," but cover only tangible and visible property. (First Nat. Bank v. Holland, 898.)

HOMESTEADS.

1. **HOMESTEADS—OCCUPANCY.**—If the owner of a house, having moved a portion of his household goods into it, with intent to occupy it as his homestead, is taken sick and dies before the house is occupied, after which his wife completes the moving and takes up her residence in the house, it is "occupied as a residence" by the family, so as to entitle the wife and minor children to claim it as a homestead. (Gill v. Gill, 213.)

2. **HOMESTEADS—OCCUPANCY.—WHILE MERE INTENTION** to occupy a residence as a homestead, unaccompanied by any acts of actual occupancy, is not alone equivalent to possession,

yet it, taken in connection with other circumstances, such as the time taken up in moving into the house and fitting it for occupancy, may constitute such a constructive occupancy as to form a sufficient basis for a claim of homestead. (*Gill v. Gill*, 213.)

3. HOMESTEAD—FRAUDULENT TRANSFERS.—Creditors have no right to complain of dealings with property which the law does not allow them to apply to their claims. Hence a gift of a homestead cannot be assailed by them as a fraud on their rights, though the donor soon afterward dies, leaving no wife or children surviving him. (*Eagle v. Smylie*, 562.)

4. FRAUDULENT TRANSFER.—IF A CONVEYANCE IS OF A HOMESTEAD alone, no fraud as to creditors can be predicated upon it. (*First Nat. Bank v. Browne*, 156.)

5. HOMESTEAD—MARSHALING AND SUBROGATION.—It is not the policy of the homestead law to apply the doctrine of marshaling assets or of subrogation, in order that the property may be subjected to encumbrances not created by the debtor himself. (*First Nat. Bank v. Browne*, 156.)

6. HOMESTEAD—MARSHALING AND SUBROGATION.—A judgment creditor, who has no lien on the homestead of his debtor, is not entitled to subrogation against a mortgagee of the homestead, nor to a marshaling of assets. (*First Nat. Bank v. Browne*, 156.)

7. HOMESTEADS—ABANDONMENT OF PART—MORTGAGE.—Husband and wife may abandon part of their homestead as such by devoting it to a use inconsistent with their homestead rights. The act of setting part of the land apart as a business house and executing a mortgage thereon to build such house is an abandonment of it for residence homestead purposes. (*O'Brien v. Woeltz*, 829.)

8. HOMESTEADS—ABANDONMENT OF PART AND MORTGAGE THEREOF.—If husband and wife give a mortgage on a piece of property, with intention to abandon it as part of their residence homestead, and to secure money to build a business house thereon, the mortgage is not void by reason of its execution being one of the acts by which the property mortgaged is segregated from the homestead. (*O'Brien v. Woeltz*, 829.)

9. HOMESTEADS—HOW ACQUIRED.—Intention cannot secure a homestead right without some act accompanying that intention which attaches to the property; and, while occupying a piece of property as his homestead, a man cannot, by intention to use it in the future, establish a homestead right in another place. (*O'Brien v. Woeltz*, 829.)

10. MORTGAGES—HOMESTEADS.—If a mortgage is void, because given on a homestead, it is not validated by a subsequent abandonment of the property as a homestead. (*O'Brien v. Woeltz*, 829.)

11. HOMESTEAD—ENCUMBRANCE.—A RIGHT TO USE THE stairway of a building occupied as a homestead, which stairway also furnishes access to an adjoining building, is an easement and not an encumbrance of the homestead; hence, both husband and wife are not required to join in the execution of an agreement granting such right. (*Stokes v. Maxson*, 367.)

12. HOMESTEADS—PURCHASE MONEY LIEN.—If a note given for a part of the purchase money of land is used by the vendor to pay another note due from him, the consideration of the purchase money note is not changed, nor is the land exempt

as the vendee's homestead from liability for its payment. (*Brown v. Ennis*, 171.)

13. **HOMESTEADS.—THE PROBATE COURT HAS NO JURISDICTION** to order the sale of a decedent's homestead for the payment of the ordinary debts of the estate, and such sale is void. The only purpose for which a probate sale of the homestead can be ordered is for the payment of debts due in a fiduciary capacity. (*Miller v. Davis*, 167.)

14. **HOMESTEADS—PROBATE SALE OF—BURDEN OF PROOF.**—In ejectment by minor heirs of a deceased homestead owner, the burden of proof rests on the person claiming the homestead under a probate sale thereof to show that it was made for the payment of a debt of a fiduciary nature. (*Miller v. Davis*, 167.)

HOMICIDE.

1. **HOMICIDE.—ONE WHO INTERVENES IN A DIFFICULTY** in behalf of his brother and takes the life of the other combatant stands in the shoes of his brother in respect of the fault in bringing on the difficulty, and cannot defend on the ground of his brother's peril unless the latter could so defend. (*Wood v. State*, 71.)

2. **HOMICIDE IN DEFENSE OF ANOTHER—EVIDENCE.**—In a prosecution for an assault with intent to murder, committed by one in intervening in a controversy in behalf of his brother and taking the life of the other combatant, evidence bearing upon the fault of such brother in bringing on the difficulty is admissible. (*Wood v. State*, 71.)

3. **HOMICIDE IN DEFENSE OF ANOTHER—EVIDENCE**—In a prosecution for an assault with intent to murder, committed by one in intervening in a controversy in behalf of his brother and taking the life of the other combatant, evidence of the particulars of a previous difficulty between such brother and the deceased is not admissible. (*Wood v. State*, 71.)

4. **HOMICIDE—SELF-DEFENSE.**—A person while in his own dwelling-house is not required to retreat from one assaulting him there, without regard to the nature of the assault or the intent of the assailant, and while the fact that he is thus in his own house does not justify him in using more force than is necessary, or in killing his assailant to prevent a mere assault, yet if the assault is "fierce and violent" he has the right to repel force by force, and to use such means as are reasonably necessary to protect himself from harm, even to the extent of taking life, if necessary to do so to preserve his own life or to prevent great bodily harm. (*Elder v. State*, 220.)

5. **HOMICIDE—SELF-DEFENSE.**—It is only in cases of absolute necessity to prevent death or great bodily harm, or in cases where, though the danger may not be real, there is yet an honest belief on the part of the person defending himself that it is real, and when the circumstances may reasonably cause such belief on his part, and when he acts with due caution and circumspection and without negligence, that the law justifies or excuses one for taking the life of another. (*Elder v. State*, 220.)

6. **HOMICIDE—SELF-DEFENSE.**—To justify the taking of human life in self-defense, the slayer must not only act in good faith under the belief that the danger is imminent, but there must be reasonable grounds for such belief on his part, and if, through carelessness or fright, or undue excitement, he takes the life of another, when it is not necessary, and when there is no reason-

able ground to believe that it is necessary, he is not excused. The causes referred to may go in mitigation of the offense and may reduce the grade from murder to manslaughter, but furnish no complete justification or excuse for the taking of the life. (*Elder v. State*, 220.)

7. **HOMICIDE—THREATS AS EVIDENCE.**—Previous threats made by, as well as the character of, the deceased are admissible in evidence when they tend to explain or palliate the conduct of the person accused of killing such deceased, by showing who was the probable aggressor. (*Bell v. State*, 188.)

8. **MURDER.—AN INDICTMENT FOLLOWING THE STATUTORY LANGUAGE**, charging that the deceased "willfully, feloniously, deliberately and of his malice aforethought did kill and murder, contrary to the form of the statute," is sufficient to charge the crime of murder in the first degree. (*Bullock v. State*, 668.)

9. **MURDER—KILLING AN OFFICER.—AN INDICTMENT** in the prescribed statutory form is sufficient for the killing of an officer in the execution of his office, without alleging that the deceased was an officer. (*Bullock v. State*, 668.)

10. **MANSLAUGHTER.—WHERE AN OFFICER, IN EXECUTING HIS OFFICE, PROCEEDS IRREGULARLY AND EXCEEDS THE LIMITS OF HIS AUTHORITY**, the law will not protect him in that excess, and if he be killed, the offense will amount to no more than manslaughter. (*Bullock v. State*, 668.)

11. **HOMICIDE—OFFICER—MOTIVE OF COMPLAINANT.—IF CRIMINAL PROCESS IS REGULAR** and legal upon its face, and within the jurisdiction of the magistrate to issue, the officer will be protected in its service, and if he is killed this will be murder, although the complainant had illegal designs in causing it to be issued, and this was known to the officer. (*Bullock v. State*, 668.)

12. **UPON AN INDICTMENT FOR KILLING AN OFFICER** while attempting to serve process, the production of the warrant or writ is all that is required, and the prior proceedings cannot be investigated. (*Bullock v. State*, 668.)

13. **HOMICIDE.—IF AN ARRESTING OFFICER MEETS WITH RESISTANCE** and kills the offender in the struggle he will be justified, and if he is killed it will be murder. (*Bullock v. State*, 668.)

14. **HOMICIDE.—A RIGHT OF SELF-DEFENSE** by an accused may arise where an arresting officer, in executing his process, of his own wrong, commits acts of violence against the accused which are not justified in the execution of his process. (*Bullock v. State*, 668.)

15. **WHETHER ONE HAS BEEN CONVICTED OF MURDER IN THE FIRST OR SECOND DEGREE** is, under the New Jersey laws, to be determined solely by the verdict, the indictment being simply for murder without setting forth the degree. (*State v. Meyer*, 634.)

HUSBAND AND WIFE.

WIFE'S ESTATE—JUDGMENT AGAINST HUSBAND—CURTESY.—A husband has no interest, during coverture, in his wife's statutory separate estate to which the lien of judgments can attach, and a conveyance of the estate in which he unites defeats his right by the curtesy. (*Bankers' Loan etc. Co. v. Blair*, 914.)

See Banks and Banking, 1, 2; Fraudulent Conveyances, 3; Gifts; Homesteads, 11; Vendor and Vendee, 4

INDEMNITY BOND.

A BOND OF INDEMNITY TO A SHERIFF TO PREVENT HIS LEVY OF AN EXECUTION is not against public policy nor void when the parties all act in good faith, and the validity of the writ depends on a new statute which has not been construed by the court, and there is an honest doubt of the right to make the levy. (Ray v. McDevitt, 548.)

INDEPENDENT CONTRACTOR.

INDEPENDENT CONTRACTORS—LIABILITY FOR NEGLIGENCE OF.—ONE WHO OWES AN ABSOLUTE DUTY to another cannot acquit himself of liability by delegating that duty to an independent contractor. (Peerless Mfg. Co. v. Bagley, 537.)

See Landlord and Tenant, 5.

INDICTMENT.

INDICTMENT—SETTING ASIDE.—FAILURE TO SWEAR A WITNESS BEFORE THE GRAND JURY is no ground for setting aside an indictment, since it is not one of the grounds prescribed by the statute, and especially where the fact testified to by the witness is not disputed. (State v. Easton, 389.)

See Homicide, 8-12.

INFANTS.

1. **AN INFANT CANNOT, DURING THE CONTINUANCE OF HIS INFANCY, DISAFFIRM** or avoid his contract or compromise on the ground that he made it while an infant. (Lansing v. Michigan Cent. R. R. Co., 567.)

2. **JUDGMENT AGAINST INFANTS WHO HAVE** had no guardian appointed to defend them is void. (Cowling v. Hill, 200.)

INJUNCTIONS.

1. **INJUNCTION.—POLICE SURVEILLANCE** of a supposed gambling resort will not be enjoined at the suit of one who has places of business in the same building, on the ground of injury to his business. (Queen City Stock etc. Co. v. Cunningham, 164.)

2. **INJUNCTION TO PROTECT POSSESSION OF DE FACTO OFFICER.**—A contestant for a public office, out of possession, may be enjoined from assuming to exercise the functions of such office during the pendency of the contest of his election and until its final determination, or until the contestee is ousted by due process of law. (Rhodes v. Driver, 215.)

3. **INJUNCTION—PUBLIC NUISANCE—UNLAWFUL USE OF STREET.**—If the injury complained of results from an unlawful and unauthorized use of the street constituting a nuisance and causing injury to the plaintiff different in kind from that suffered by the community generally, he is entitled to relief by injunction. (Townsend v. Epstein, 441.)

4. **INJUNCTION—INJURY FROM TUNNEL.**—If an abutting owner on a city street is not injured by the construction of a tunnel under the street, he is not entitled to an injunction to prevent its maintenance. (Townsend v. Epstein, 441.)

5. **INJUNCTIONS—CORPORATIONS—CONFLICTING INTERESTS.**—On an application for an injunction by one electric light

company against another, the court will enjoin not only wanton and negligent damage by the defendant, but also all interference which is not strictly unavoidable, and in regard to keeping defendant's wires clear of those in bona fide use by plaintiff and necessary for its business, the injunction must be made absolute without regard to extra cost of other methods. (*Edison Electric etc. Co. v. Merchants' etc. Power Co.*, 712.)

6. INJUNCTION.—THE UNAUTHORIZED ISSUANCE OF A RESTRAINING ORDER without notice furnishes no reason for refusing a temporary injunction after a full hearing. (*Lemmon v. Town of Guthrie Center*, 361.)

7. INJUNCTION.—THE PENDENCY BEFORE A MAYOR OF PROCEEDINGS TO REMOVE A BUILDING is no obstacle to the granting by a court of an injunction to restrain such removal, where the mayor is without jurisdiction to entertain such proceedings. (*Lemmon v. Town of Guthrie Center*, 361.)

8. INJUNCTION—FIRE LIMITS.—UNDER AN ORDINANCE FIXING FIRE LIMITS, which permits veneered buildings to be erected, and provides that a building may be removed upon two days' notice if the ordinance is not complied with, a person is entitled to a reasonable time within which to put his building in the condition exacted by the ordinance, and an injunction may issue to restrain the removal of the building within such time. (*Lemmon v. Town of Guthrie Center*, 361.)

9. INJUNCTION.—THE REMOVAL BEYOND THE FIRE LIMITS of a building permanently located and which has become a part of the land is such an injury to the real estate as will justify an injunction without any showing of insolvency on the part of the defendants. (*Lemmon v. Town of Guthrie Center*, 361.)

10. AN INJUNCTION WILL ISSUE WHENEVER THE THREATENED TRESPASS will permanently diminish the substance of the estate in that which constitutes its chief value, without reference to the fact that the value may be measured in money. (*Lemmon v. Town of Guthrie Center*, 361.)

See Easements, 2.

INSANE PERSONS.

1. CONSTITUTIONAL LAW—COMMITMENT OF ALLEGED INSANE PERSONS.—A statute under which a person may be committed to and confined in a hospital for the insane without giving him any notice of the proceeding against him and authorizing the judge to so commit him upon receiving a certificate from medical examiners, is unconstitutional. (*In re Lambert*, 296.)

2. CONSTITUTIONAL LAW.—AN ORDER FOR THE COMMITMENT OF A PERSON TO AN INSANE HOSPITAL IS ESSENTIALLY A JUDGMENT, by which he is deprived of his liberty. Hence before it can be given, there must be a trial of the issues upon which it is founded. (*In re Lambert*, 296.)

3. INSANE PERSONS—RIGHT OF ALLEGED TO BE HEARD BEFORE COMMITMENT.—The constitutional guaranty against a person being deprived of his liberty without due process of law is violated whenever a judgment may be entered finding a person to be insane, without giving him an opportunity to be heard in his defense of the charge, and upon such hearing, to offer evidence in support of his defense. If his right to a hearing depends upon the will or caprice of others, or upon the will or discretion of the judge who is to make the decision upon the issue, he is not protected in his constitutional rights. (*In re Lambert*, 296.)

INSTRUCTIONS.

1. **THE REFUSAL TO GIVE INSTRUCTIONS ASKED FOR** is not error where, in so far as they were correct, they were fully covered by those given. (*State v. Easton*, 389.)

2. **JURY TRIAL—INSTRUCTIONS, LENGTH OF.**—A judgment cannot be reversed because an instruction given was too lengthy. (*Weller v. Chicago etc. R. R. Co.*, 592.)

3. **JURY TRIAL—REFUSAL OF CUMULATIVE INSTRUCTIONS.**—REFUSAL TO GIVE INSTRUCTIONS the points in which have been already given in other instructions is not reversible error. (*Weller v. Chicago etc. R. R. Co.*, 592.)

INSURANCE.

1. **INSURANCE OF LIVESTOCK IS NOT RESTRICTED TO THEM WHILE ON THE FARM OF THE ASSURED** under a policy describing the property as livestock, carriages, and farm implements situated on section 5 of a designated township, but adding "stock insured against lightning anywhere in Kent, Allegan, and Ottawa counties." (*Hapeman v. Citizens' etc. Ins. Co.*, 535.)

2. **INSURANCE OF LIVESTOCK AGAINST LOSS BY LIGHTNING** includes their loss through the burning of buildings immediately caused by lightning. (*Hapeman v. Citizens' etc. Ins. Co.*, 535.)

3. **INSURANCE—ASSIGNMENT OF MORTGAGEE'S INTEREST.**—If an insurance policy on property is issued to the mortgagors payable to the mortgagee as his interest may appear, the assignment by the mortgagee of his interest in the policy is not a violation of a condition against the assignment of the policy. (*Whiting v. Burkhardt*, 503.)

4. **INSURANCE—POWER OF MORTGAGEE TO ASSIGN.**—A mortgagee to whom a policy of insurance is made payable as his interest may appear may assign to the assignee of the mortgage the right to receive on the same terms the proceeds of the policy. (*Whiting v. Burkhardt*, 503.)

5. **INSURANCE.—THE ASSIGNMENT BY ONE OF THE MORTGAGORS** of his interest in insured property does not avoid the right of the mortgagee to recover on a policy payable to him, and providing that the act of no one other than himself or those claiming under him shall affect his right to recover in case of loss. (*Whiting v. Burkhardt*, 503.)

6. **INSURANCE—MORTGAGE CLAUSE—ESTOPPEL.**—If an insurance policy is void, and the company, without knowledge thereof, attaches a mortgage clause to the policy without consideration at the instance of the mortgagee, who is also ignorant of the fact that the policy is void, and who because of the mortgage clause neglects to get other insurance, the company is not thereby estopped to deny the validity of the policy. (*Baldwin v. German Ins. Co.*, 375.)

7. **FIRE INSURANCE—RECOVERY BY MORTGAGEE.**—If insurance is effected on mortgaged premises payable to the mortgagee as his interests may appear, the balance, if any, to the mortgagor, and the amount due on the mortgage is equal to, or exceeds, the loss under the policy, the mortgagee is the only person entitled to recover. (*Capital City Ins. Co. v. Jones*, 152.)

8. **FIRE INSURANCE—RECOVERY BY MORTGAGOR.**—If insurance is effected on mortgaged property payable to the mortgagee as his interests may appear, the balance, if any, to the

mortgagor, and the amount due on the mortgage is less than the loss under the policy, the mortgagor may sue for the difference. (Capital City Ins. Co. v. Jones, 152.)

9. **INSURANCE—CHANGE OF INTEREST BY DEATH.**—The death of the insured and the descent of the property insured to his wife and children do not work such a change in the title or possession of the property as to avoid the policy of insurance. (Planters' Mutual Ins. Assn. v. Dewberry, 195.)

10. **INSURANCE—CHANGE OF POSSESSION—LEASE.**—If the wife of the insured, after his death, leases the property without the insurer's consent and surrenders possession to the tenant, this is such change of possession as avoids the policy conditioned that it shall be void in case of change in possession or occupancy of the property without the consent of the insurer. (Planters' Mutual Ins. Assn. v. Dewberry, 195.)

11. **INSURANCE, MARINE—PART INSURANCE.**—If a vessel is insured for a part only of its value, the owner is a coinsurer as to the uninsured part, and in case of loss to that part, which is called the owner's risk, it must be taken into consideration in fixing the proportion of their loss to be paid by the insurers. (Egan v. British etc. Ins. Co., 342.)

12. **INSURANCE—RIGHT OF SUBROGATION.**—If an insurer pays a loss which is due to the wrongful act of another, he is subrogated to the rights of the insured and may in the name of the latter prosecute a suit against the wrongdoer and reimburse himself. (Egan v. British etc. Ins. Co., 342.)

13. **INSURANCE, MARINE—RIGHT OF INSURER TO SHARE IN RECOVERY.**—Although the insurer of a vessel does not participate in a libel against another vessel causing the loss commenced by the insured without notice to the insurer or request that he become a party to the proceeding, he does not thereby waive his right to his share of the amount recovered in the libel suit. (Egan v. British etc. Ins. Co., 342.)

14. **INSURANCE, LIFE—WARRANTIES.**—The validity of a policy of life insurance must depend upon the statements made in the written application, regardless of any oral communications made by the applicant to the soliciting agent. (Fidelity Mut. etc. Assn. v. Harris, 813.)

15. **INSURANCE—CONFLICT OF LAWS—MATERIALITY OF REPRESENTATIONS.**—If a contract of insurance is made in, and governed by, the laws of another state, wherein representations in an application for insurance as to previous medical attendance are material to the risk, as matter of law, such holding is conclusive as to the materiality of such representations in an action on the policy in another state. (Fidelity Mut. etc. Assn. v. Harris, 813.)

16. **CONFLICT OF LAWS—PLACE WHERE MADE—CONTRACTS OF INSURANCE** upon applications taken in one state by an agent without authority to conclude the contract or bind the company, and forwarded to the domicile of the company and there accepted and the policy issued, are ordinarily to be treated as having been made at such domicile and to be performed there. (Fidelity Mut. etc. Assn. v. Harris, 813.)

17. **INSURANCE—CONFLICT OF LAWS—PLACE OF CONTRACT.**—If the first payment of premium is forwarded with the application for insurance, a provision in the policy that it "shall not be binding until delivery during the lifetime and good health of the applicant, and until the first payment due thereon has been

made," does not suspend the contract until delivered to the insured and make the place of delivery that of the contract, especially when the policy is forwarded to the agent for unconditional delivery. (*Fidelity Mut. etc. Assn. v. Harris*, 813.)

18. **INSURANCE—CONTRACT, WHEN COMPLETE.**—The acceptance of an application for insurance and the issuance and mailing of the policy are all of the acts that are essential to put the contract in force. The fact that the policy is then sent to an insurance agent for unconditional delivery does not alter the effect of the transaction, nor make the place of delivery the place where the contract is made. (*Fidelity Mut. etc. Assn. v. Harris*, 813.)

19. **LIFE INSURANCE—WHO MAY RECOVER.**—Under a contract of insurance authorizing the payment of the amount of the policy to any relative or connection of the insured, or to one incurring expense in his behalf, one to whom such payment might be made, but who is not named as beneficiary, cannot enforce the policy. Such suit can be maintained only by the executor or administrator of the insured. (*Lewis v. Metropolitan Life Ins. Co.*, 463.)

20. **LIFE INSURANCE.—THE FACT THAT ONE PAYS THE PREMIUMS** on the life insurance policy of another does not entitle him to sue thereon. Such premiums are, in legal contemplation, paid by the insured. (*Lewis v. Metropolitan Life Ins. Co.*, 463.)

See Benefit Society.

INTEREST.

1. **CONSTITUTIONAL LAW—INTEREST ON JUDGMENTS.**—A statute providing that no judgment rendered against any county on county warrants or other evidence of county indebtedness shall thereafter bear any interest is valid, and is not an *ex post facto* law, nor does it impair the obligation of any contract, nor deprive a judgment creditor obtaining judgment before its passage of his property without due process of law. (*Read v. Mississippi County*, 202.)

2. **CONSTITUTIONAL LAW—INTEREST ON JUDGMENTS.**—A state may legislate to reduce the rate of interest upon judgments previously obtained in its courts. Such legislation does not deprive the judgment creditor of his property without due process of law. (*Read v. Mississippi County*, 202.)

INTERSTATE COMMERCE.

1. **INTERSTATE COMMERCE.—NO STATE CAN IMPOSE** upon the products of other states, or upon their transportation, or upon citizens engaged in the sale thereof, more onerous public burdens than it imposes upon like products of its own territory. (*State v. Zophey*, 741.)

2. **INTERSTATE COMMERCE.—A STATUTE IMPOSING A LICENSE FEE** upon wholesale liquor dealers whose products are manufactured without the state, and imposing a manufacturing license upon the manufacturers of liquors within the state but exempting them from the wholesale dealer's license, the latter license being more onerous than the manufacturer's, conflicts with the commerce clause of the federal constitution. (*State v. Zophey*, 741.)

3. **INTERSTATE COMMERCE — TAXATION.—TELEGRAPH COMPANIES** are instruments of commerce. While their property within a state may be taxed by the state as other property is

taxed, yet their interstate business cannot be. (Postal Tel. Co. v. Richmond, 877.)

4. INTERSTATE COMMERCE.—A CITY MAY IMPOSE A LICENSE FEE upon a telegraph company or agency for business done exclusively therein, not including interstate business or business for the government. (Postal Tel. Co. v. Richmond, 877.)

5. INTERSTATE COMMERCE.—A CITY MAY IMPOSE A LICENSE TAX upon an agency of interstate commerce, such as a telegraph company, provided the tax is not in excess of that to which the property of the company within the jurisdiction of the city would be subject under the ordinary modes of taxation. (Postal Tel. Co. v. Richmond, 877.)

6. INTERSTATE COMMERCE.—A CITY CANNOT LEVY A LICENSE TAX on a telegraph company, doing interstate business, in excess of what an ad valorem tax on its property within the city would be. Nor can it make the payment of this tax a condition precedent to the right to transact business. (Postal Tel. Co. v. Richmond, 877.)

See Municipal Corporations, §

JUDGE.

JUDGE—DISCRETION OF.—In matters which may be left generally to the discretion of the trial judge, his discretion is not unlimited. He is not at liberty to disregard the rules of law, by which the rights of the parties are governed. (De Forge v. New York etc. R. R. Co., 464.)

JUDGMENTS.

1. JUDGMENTS—APPEAL—SUPERSEDEAS.—An appeal by an executor without a bond from a personal judgment in the circuit court against him on final settlement of the estate does not operate as a supersedeas, and when the circuit court judgment is certified back to the probate court, the latter may order final distribution the same as if no appeal had been taken. (State v. Henderson, 618.)

2. JUDGMENTS—ENTRY OF.—A judgment is the act of the court and the final determination of the rights of the parties. Its entry in the record is the act of the clerk and merely ministerial, and while the judgment may be proven only by the record, yet it derives its force, not from its entry on the record, but from its rendition by the court. (State v. Henderson, 618.)

3. JUDGMENTS, TIME OF ENTRY OF.—The validity of a judgment properly rendered is not affected by the delay of the clerk in entering it in the court record. (State v. Henderson, 618.)

4. JUDGMENTS.—DOCKETING AND INDEXING a judgment against a wife by the name of "Mrs. T. Frank Simmons" is not constructive notice that it is a lien on real estate standing on the record in the name of "May M. Simmons," though she is the wife of T. Frank Simmons. (Bankers' Loan etc. Co. v. Blair, 914.)

5. A JUDGMENT MERGES THE CAUSE OF ACTION on which it is based, irrespective of the character of such action, and it cannot again be made the subject of a suit. (Fisher v. Hartley, 89.)

6. JUDGMENTS—MERGER—MORTGAGE LIEN.—The lien of a mortgage is not merged in a judgment of foreclosure of the mortgage, so as to expire with the expiration of the judgment lien. (Ford v. Harrison, 192.)

7. **RES JUDICATA—PARTIES.—A JUDGMENT IN EJECTMENT IN FAVOR OF AN ADMINISTRATOR** is not admissible in a subsequent action against him personally by the same plaintiff to quiet title to the same land. (*Loftis v. Marshall*, 286.)

8. **JUDGMENT IN EJECTMENT IN FAVOR OF TENANT—EFFECT OF IN FAVOR OF HIS LANDLORD.—A judgment in ejectment in favor of a tenant of real property does not inure to, and protect, his landlord, though the latter employed the attorney and directed the defense. To become entitled to the benefit of a judgment, as an estoppel in his favor, the landlord must appear openly in the case, and, by permission of the court, undertake the defense, and his appearance or substitution should be entered of record, and allowed only upon notice to the parties. (*Loftis v. Marshall*, 286.)**

9. **JUDGMENTS—RES JUDICATA—INSTALLMENTS OF SPECIAL ASSESSMENTS.—A judgment sustaining the action of a lower court in overruling objections to an application for a judgment of sale for certain installments of a special assessment is res judicata as to subsequent installments as to all objections raised, or which might properly have been raised, and determined in the former proceeding. (*Gross v. People*, 322.)**

10. **JUDGMENTS.—QUESTIONS THAT ARE DEEMED RES JUDICATA** are not confined to those raised and insisted on at the former adjudication, but embrace also those which were involved in the issue and might have been properly insisted upon. (*Gross v. People*, 322.)

11. **RES JUDICATA—PERSONAL SERVICE OF PROCESS.—The fact that the defendant was not a resident of the state cannot be established by a judgment against him in an attachment suit based on the ground of nonresidence, if he was not served with process and did not appear in that suit. (*State v. Allen*, 29.)**

12. **JUDGMENTS—ACTIONS UPON.—A judgment creditor cannot maintain an action upon his judgment without showing some advantage to be gained thereby; but if it is made to appear that a second judgment may be in any respect more available than the first, the action should be allowed. (*Stevens v. Stone*, 861.)**

13. **JUDGMENTS—ACTIONS UPON.—If a judgment is not dormant, and it appears that a new judgment thereon would be available in another jurisdiction where the defendant has property which cannot be reached under the first judgment because of the statute of limitations, an action may be maintained thereon. (*Stevens v. Stone*, 861.)**

14. **JUDGMENTS—ACTIONS UPON—LIMITATIONS.—The statute of limitations of ten years applies to actions upon judgments, and such actions are not barred until the lapse of that period of time from the issuing of the last execution thereon. (*Stevens v. Stone*, 861.)**

15. **LIMITATIONS OF ACTIONS UPON JUDGMENTS.—UNTIL THE EXPIRATION OF THE TIME WITHIN WHICH AN APPEAL MAY BE TAKEN** from a judgment, the statute of limitations does not commence to run against an action thereon. (*Feeney v. Hinckley*, 290.)

16. **A JUDGMENT IS NOT FINAL** so as to support an action thereon while the judgment debtor retains the right to appeal therefrom or to prosecute proceedings for a new trial. (*Feeney v. Hinckley*, 290.)

17. **FOREIGN JUDGMENT.—THE VALIDITY OF THE CONTRACT** upon which a judgment is rendered in a sister state is

established by such judgment, and cannot afterward be questioned. (Vaught v. Meador, 908.)

18. FOREIGN JUDGMENT.—IF A PARTY SEEKING TO ENFORCE a judgment of a sister state has by fraud obtained real property of the defendant without the state on which he held a deed of trust to secure the debt on which the judgment was based, the parties should be restored to the positions they occupied before the fraud was committed, or the value of the property should be set off against the judgment, with a decree for the excess, if any, in favor of the defendant. (Vaught v. Meador, 908.)

19. DECREE—EXTRATERRITORIAL EFFECT.—If a decree determines the equities of the parties in respect to land in another state, and directs a conveyance in accordance therewith, such decree, while it does not operate to transfer the title, may be pleaded as a cause of action or as a defense in the courts of the state where the land is situated, and is there entitled to the force and effect of record evidence of the equities determined. (Vaught v. Meador, 908.)

See Infants, 2; Interest; Limitation of Actions, 3.

JURY.

See Trial, 2-4.

LANDLORD AND TENANT.

1. IF A LEASE IS MADE IN PAROL, A SUBSEQUENT MEMORANDUM written after the lessor parted with his title can have no effect as against a stranger. (Emery v. Boston Terminal Co., 473.)

2. STATUTE OF FRAUDS—ESTOPPEL.—Although a written lease of land for more than one year cannot be altered or destroyed by any subsequent verbal agreement under the statute of frauds, yet such agreement operates as an estoppel against the landlord and his grantee taking with notice thereof, if such landlord by his conduct has induced the tenant to act upon such verbal agreement. (Conley v. Johnson, 209.)

3. IMPLIED EASEMENT.—IF ONE LEASES DIFFERENT PORTIONS OF THE SAME BUILDING to two tenants, an implied easement or right of way through the premises of one tenant to the premises of the other does not arise, when it is not a necessity, but only a convenience. (Walker v. Clifford, 74.)

4. EASEMENT—WHO MAY ENFORCE.—IF ONE LEASES different portions of the same building to two tenants, and one of them claims a right of way through the premises of the other, he, and not the lessor, is the proper party to sue for the obstruction of the easement, where the obstruction is not an injury to the reversion. (Walker v. Clifford, 74.)

5. LANDLORD AND TENANT—LIABILITY OF THE FORMER FOR THE ACTS OF AN INDEPENDENT CONTRACTOR.—If a landlord undertakes to make improvements and repairs for his tenant, he cannot relieve himself of the consequences of negligence by employing an independent contractor. Therefore, if a landlord agrees with his tenant to put in the leased building an automatic system for extinguishing fires, and the landlord, being himself inexperienced, employs an experienced independent contractor, who, by his negligence, uses sprinkler heads designed to fuse at too low a temperature, and the tenant is subsequently injured by their so

fusing, the landlord is liable to the tenant for the loss. (*Peerless Mfg. Co. v. Bagley*, 537.)

See Eminent Domain, 2-4; Forfeitures; Judgments.

LATERAL SUPPORT.

See Mines and Mining, 5-11.

LEASES.

See Landlord and Tenant.

LIBEL.

1. **LIBEL—PUBLICATION.**—The writing and sending of a letter containing libelous matter, not read nor exhibited to any person other than the one libeled, is not the publication of the libel. (*Gambrill v. Schooley*, 414.)

2. **LIBEL—PUBLICATION BY DICTATION.**—The dictation of a libelous letter to a confidential shorthand writer and the copying of it by him on a typewriting machine, after which it is signed by the person dictating it, is a publication of its contents, so as to entitle the person to whom it is addressed to maintain either libel or slander upon it, although there is no communication of its contents to any other person. (*Gambrill v. Schooley*, 414.)

3. **LIBEL—DAMAGES.**—If the words charged in an action for slander or libel are actionable per se, the question of damages, whether exemplary or otherwise, is exclusively within the sound discretion of the jury. (*Gambrill v. Schooley*, 414.)

4. **LIBEL—DAMAGES—MALICE—DISCRETION OF JURY.**—If the defendant, in an action for libel, honestly and in good faith believed the statements contained in the letters alleged to be libelous to be true, and had grounds for such belief sufficient to satisfy an ordinarily prudent man, the jury may take into consideration all the circumstances of the case, and, in the exercise of their discretion, award nominal damages merely. (*Gambrill v. Schooley*, 414.)

5. **LIBEL—DAMAGES—DISCRETION OF JURY.**—If in an action for libel there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury, but it is error to instruct the jury in such case, that exemplary damages must be given. (*Gambrill v. Schooley*, 414.)

LICENSE TAX.

See Interstate Commerce, 2-11; Municipal Corporations, 14.

LIMITATION OF ACTIONS.

1. **THE STATUTE OF LIMITATIONS AS AGAINST A DEMAND WHICH A DEBTOR AGREES TO PAY AT OR UPON HIS DEATH** cannot commence running in his lifetime. The result is the same if the demand was at first enforceable at once; but the parties substitute for it an agreement that it shall be paid after the death of the debtor. (*Davis v. Teachout*, 531.)

2. **STATUTE OF LIMITATIONS—INDORSEMENT OF PAYMENT ON A PROMISSORY NOTE IS NOT EVIDENCE OF A NEW PROMISE**, nor does it interrupt the running of the statute of limitations if the payment resulted merely from crediting on the note a sum realized from the sale of property under a chattel mort-

gage. Though the mortgagee, in making the sale, acted under a power contained in the mortgage and was under a duty to credit the amount realized, yet, in so doing, he cannot be regarded as acting as agent of the mortgagor to the extent of making a new promise for him. (*Westinghouse Co. v. Boyle*, 570.)

3. THE STATUTE OF LIMITATIONS IN AN ACTION ON A JUDGMENT is not prevented from operating by the fact that the defendant, having departed from the state after the accrual of the original cause of action, could not successfully plead the statute of limitations against the suit thereon. That cause merged in the judgment, and cannot be regarded as being the subject matter of a suit on such judgment. (*Fisher v. Hartley*, 39.)

4. STATUTE OF LIMITATIONS.—IF ONE REMOVES FROM THE STATE both before the birth of the cause of action and before the right to sue thereon accrues, his absence from the state does not prevent the running of the statute of limitations. (*Fisher v. Hartley*, 39.)

5. STATUTE OF LIMITATIONS—OBSTRUCTION TO PROSECUTION OF ACTION, WHAT IS WITHIN THE MEANING OF.—The departure from, and residence out of, the state after the accruing of a cause of action are of themselves obstructions to the prosecution of the right of action. (*Fisher v. Hartley*, 39.)

6. LIMITATION OF ACTIONS—INSTALLMENT NOTES.—A provision in a contract that on default in the payment of one or more of a series of installment notes those remaining unpaid shall become due and payable operates to mature the entire debt and to set the statute of limitations running against all upon such default, and not merely to give the creditor an option whether or not he will then treat the whole debt as due. (*San Antonio etc. Loan Assn. v. Stewart*, 864.)

7. LIMITATION OF ACTIONS.—The fact that the party invoking the statute of limitations may have put it in motion by his own wrong is no obstacle to its operation. (*San Antonio etc. Loan Assn. v. Stewart*, 864.)

8. LIMITATION OF ACTIONS—MATURITY OF DEBT—NEW AGREEMENT.—If a contract provides that on default in the payment of one of several notes the remaining unpaid notes shall become due, the statute of limitations begins to run against the entire debt upon such default, and the creditor cannot by his act alone change that effect, but the parties may by mutual agreement change the effect of the default and treat the contract as if no default had been made. The surrender by the debtor of his right to discharge the whole debt at once and his securing further credit is consideration from each party for such agreement. (*San Antonio etc. Loan Assn. v. Stewart*, 864.)

9. LIMITATION OF ACTIONS—NEW PROMISE—ORAL AGREEMENT.—A statute requiring a new acknowledgment of a debt to be in writing to take the case out of the operation of the statute of limitations does not apply to a parol agreement waiving the effect of a default in the payment of part of debt as maturing the whole debt. The effect of such waiver is to take away the right to sue until the new maturity of the debt, while the statute applies only to a cause of action against which it runs, because of its maturity. (*San Antonio etc. Loan Assn. v. Stewart*, 864.)

See Adverse Possession; Judgments, 14-16; Mines and Mining, 7-9; Municipal Corporations, 2; Vendor and Vendee, 9.

LIS PENDENS.

1. **LIS PENDENS.**—A SALE BY ONE DEFENDANT TO ANOTHER of the subject of litigation, during its progress, cannot defeat the object of the suit. (Goff v. McLain, 64.)

2. **LIS PENDENS—PURCHASER AT JUDICIAL SALE.**—THE SEVERANCE AND SALE OF STANDING TIMBER from lands during the progress of a suit to subject them to sale in satisfaction of a judgment, do not remove them from the operation of the lis pendens, and the purchaser is entitled to the appointment of a receiver to take possession of such timber and to an injunction to prevent its removal. (Goff v. McLain, 64.)

3. **LIS PENDENS.**—A TRANSFER FOR THE PURPOSE OF AVOIDING THE EFFECT OF A PENDING SUIT is void as against any judgment which may be afterward rendered therein. (Goff v. McLain, 64.)

LOTTERY TICKETS.

See Municipal Corporations, 13.

MARRIAGE AND DIVORCE.

1. **DIVORCE—ADULTERY AS BAR.**—A complainant who asks a divorce on the ground of extreme and repeated cruelty should be denied a decree if guilty of adultery. (Decker v. Decker, 325.)

2. **DIVORCE.**—ADULTERY IS A GOOD RECRIMINATORY DEFENSE to a charge of extreme and repeated cruelty. (Decker v. Decker, 325.)

3. **DIVORCE.**—ADULTERY IS A DEFENSE IN RECRIMINATION in all divorce cases, regardless of the cause for divorce or the kind of relief prayed for. (Decker v. Decker, 325.)

MARSHALING.

See Homesteads, 5, 6.

MASTER AND SERVANT.

1. **MASTER AND SERVANT—LIABILITY FOR ACT OF SERVANT.**—If an injury is caused by a servant in the use of means fairly adapted to accomplish the purpose of his employment, his master is liable, though the act of the servant is wrongful or unauthorized. If the act of the servant does not fairly tend to effectuate the discharge of the duty for which he is employed, his master is not liable. (Guille v. Campbell, 705.)

2. **MASTER AND SERVANT—LIABILITY FOR UNAUTHORIZED ACT OF SERVANT.**—If a servant employed to remove bales of cotton from the sidewalk to a warehouse waves a bale hook at boys playing around the bales, for the purpose of frightening them away, and the hook slips from his hand, striking and injuring a boy, who is not about the bales, nor trespassing, or interfering with the work in any way, his master is not liable for the injury thus inflicted. (Guille v. Campbell, 705.)

3. **MASTER'S LIABILITY FOR SERVANT'S ACT.**—THE RULE AS TO THE EXTENT of the liability of a master for the acts of his servant is, that if the act is done without the authority of the master and not for the purpose of executing his orders or doing his work, then he is not responsible; but if it is done in the

execution of the authority given by the master and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful. (McCarthy v. Timmins, 490.)

4. MASTER'S LIABILITY FOR NEGLIGENCE OF DRIVER.—The driver of a public carriage who, when ordered to drive to the stable at the close of the day's work, turns from his course to a saloon to get a drink and there leaves the team unattended, is not acting within the scope of his employment, and his employer is not liable to one injured by the horses running away. (McCarthy v. Timmins, 490.)

5. MASTER AND SERVANT.—IT IS NOT WITHIN THE SCOPE OF THE AUTHORITY of a servant, to whose custody his master's property has been confided, to undertake to secure it from future injury by chastising persons who have done damage to it in the past. (Brown v. Boston Ice Co., 469.)

6. MASTER AND SERVANT.—A SERVANT, IN ASSAULTING a boy to punish him for breaking his master's ax, is not acting within the scope of his employment, and the master is not liable for the assault. (Brown v. Boston Ice Co., 469.)

7. A MASTER IS BOUND TO EXERCISE ALL REASONABLE CARE, having respect to the nature of the service, to provide and to maintain safe, sound, and suitable machinery and instrumentalities for doing the work, and also to use due diligence and care in the selection and employment of competent and careful fellow-servants. If he observes these precautions, he is not liable to his servant for injuries sustained in the course of the employment, even though caused by the negligence of a fellow-servant under such circumstances as would have made the master liable to a stranger if the latter had been injured. (Baltimore Boot etc. Co. v. Jamar, 428.)

8. IN THE RELATION OF MASTER AND SERVANT UPON CONTRACT OF SERVICE, express or implied, between the parties, the essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist. (Baltimore Boot etc. Co. v. Jamar, 428.)

9. MASTER AND SERVANT—CONVICT EMPLOYEES.—As between a contractor and a convict whose labor he employs from the state, the relation of master and servant does not exist in its fullest extent, because the convict is in involuntary servitude, and the control over him by the contractor is limited. (Baltimore Boot etc. Co. v. Jamar, 428.)

10. MASTER AND SERVANT—DUTY TO CONVICT EMPLOYEE.—As between a contractor and a convict whose labor he employs from the state, the former should be held to a master's liability to the latter in respect to those incidents of the employment over which he has the same measure of control that a master ordinarily has, but not as to those features of the employment over which he is essentially deprived of such control. (Baltimore Boot etc. Co. v. Jamar, 428.)

11. MASTER AND SERVANT — CONVICT EMPLOYEES — ELEVATOR ACCIDENT.—The relation which exists between a contractor and a convict whose labor he employs from the state is so far analogous to that of master and servant, that the contractor who has full control over the construction and maintenance of an elevator and uses that structure for his own benefit must be held liable

to the convict employé for any injury which he suffers by reason of want of reasonable care on the part of the contractor in providing and maintaining the elevator in a safe and sound condition. (Baltimore Boot etc. Co. v. Jamar, 428.)

12. MASTER AND SERVANT—CONVICT EMPLOYEES—NEGLIGENCE—ELEVATOR ACCIDENT.—A convict employé whose labor is employed by a contractor from the state is not guilty of contributory negligence in going underneath an elevator owned, maintained, and used by such contractor, when it is necessary for him to do so to operate it, and he has been assigned to that duty as a convict, and is compelled to obey such assignment; but he is guilty of contributory negligence if injured while underneath the elevator, if he could have operated it without going under it, or if before going under it or at the time of the accident he saw that it was caught at an upper floor, or if after he got under it he heard calls to him to stand from under and did not heed them. (Baltimore Boot etc. Co. v. Jamar, 428.)

See Assault, 2.

MERGER.

See Judgments, 5, 6.

MINES AND MINING.

1. MINING CLAIMS—WHEN NOT SUBJECT TO THE ORIGINAL MINING ACT OF 1872.—If, under the "placer act" of Congress of July, 1870, location and payment were made and a certificate of purchase issued, the purchaser became entitled to a patent free of the reservations required to be inserted in patents by the "general mining act" of May, 1872, excluding vein or lode claims not included in the application for the patent. (Cranes Gulch Min. Co. v. Scherrer, 279.)

2. MINING CLAIMS.—ONE WHO HAS BECOME ENTITLED TO A PATENT, the issuing of which is delayed, is not by such delay subject to any diminution of his rights, nor to additional burdens or the assault of third persons. (Cranes Gulch Min. Co. v. Scherrer, 279.)

3. MINING CLAIMS—LODES, WHEN INCLUDED IN PATENT FOR PLACER MINES.—A patent issued for a placer mine under the act of Congress of July, 1870, passes all lodes within the boundaries described in such patent, in the absence of a located lode within such boundary or of a contest. (Cranes Gulch Min. Co. v. Scherrer, 279.)

4. MINES AND MINING—RIGHT TO SURFACE SUPPORT.—In case of a horizontal division of land, the owner of the subjacent estate, coal, or other mineral owes to the superincumbent owner an absolute right of support arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if it is necessary to that end to leave every particle of the mineral untouched under his land. (Noonan v. Pardee, 722.)

5. MINES AND MINING—SURFACE SUPPORT.—CAUSE OF ACTION for failure to afford sufficient surface support arises at the time when the mineral constituting such support is removed, although the surface owner may have been ignorant of the violation of his right to support. (Noonan v. Pardee, 722.)

6. MINES AND MINING—SURFACE SUPPORT—RIGHT OF ACCESS TO MINE.—The right of the surface owner to surface sup-

port gives him the right of access to the mine to enable him to see that his right is being maintained by the performance of the duty owing to him by the mine operator. (Noonan v. Pardee, 722.)

7. MINES AND MINING—SURFACE SUPPORT—STATUTE OF LIMITATIONS.—If the failure to furnish sufficient surface support arises from mining either by the mine owner or his predecessors, more than six years before suit, the action is barred by the statute of limitations, but the right to sue passes to the surface owner who is in possession when the subsidence occurs without regard to the date of his conveyance, and this right is barred by limitation if the cause of the subsidence arose more than six years before suit brought. (Noonan v. Pardee, 722.)

8. MINES AND MINING—SURFACE SUPPORT—STATUTE OF LIMITATIONS.—Even if the main body of the mineral under the surface owner's land has been mined out more than six years before suit brought, yet if the mine owner has done additional mining by the removal of mineral left in previous work, or by robbing of pillars within six years before suit, and without such additional mining the surface would not have subsided during plaintiff's occupancy, the mine owner is answerable in damages therefor. (Noonan v. Pardee, 722.)

9. MINES AND MINING—SURFACE SUPPORT—LIMITATION OF ACTION.—If a mine operator, by mining within six years another underlying seam, whereby the pillars and support left in the seam above, which otherwise would have been sufficient support to the surface, have been rendered insufficient, and a "cave-in" has occurred, the mine operator is liable to the surface owner in damages. (Noonan v. Pardee, 722.)

10. MINES AND MINING—SURFACE SUPPORT.—MEASURE OF DAMAGES for the removal of surface support unlawfully by mining is the actual loss sustained to the land, including the buildings thereon caused by the "cave-in." (Noonan v. Pardee, 722.)

11. MINES AND MINING—SURFACE SUPPORT—LATERAL SUPPORT—ALLEGATIONS AND PROOF.—If the sole cause of action alleged is the removal of surface support by mining, no recovery can be had on proof of the removal of lateral support, as the duty of maintaining surface support and of maintaining lateral support are entirely different, and the rule of damages is not the same in both cases. (Noonan v. Pardee, 722.)

MISTAKE.

See Release, 2.

MORTGAGES.

MORTGAGE SALE—ADVERTISEMENT.—IF THERE HAS BEEN A RELEASE of part of the mortgaged property, and the advertisement for sale includes all the land originally encumbered, while by the terms of the mortgage all the land over which the mortgagee has a power of sale is the land remaining after the release, the sale is not a valid execution of the power. (People's Sav. Bank v. Wunderlich, 493.)

See Chattel Mortgages; Executions, 2; Homesteads, 7-12; Judgments, 6.

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MUNICIPAL CORPORATIONS.

1. **FIRE LIMITS—REMOVING BUILDING.**—A building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceedings whatever. (*Lemmon v. Town of Guthrie Center*, 361.)

2. **MUNICIPAL CORPORATION.—THERE CAN BE NO LIMITATION** against a municipal corporation as to property held for the public. (*Mobile Trans. Co. v. Mobile*, 143.)

3. **MUNICIPAL PROPERTY—ESTOPPEL TO ASSERT TITLE.**—The wrong or error of collecting a tax on public property does not estop a municipal corporation to assert its legal title. (*Mobile Trans. Co. v. Mobile*, 143.)

4. **THE IDENTITY OF A MUNICIPAL CORPORATION IS NOT CHANGED** by the repeal of its charter and the substitution of a new organization. If there is an alteration of name, it may be proper, in a pending suit, for the pleadings to trace the change; but if there is no such alteration, and judicial notice is taken of the laws effecting the change, it is unnecessary to make any averment or obtain any order respecting the prosecution of the suit. (*Mobile Trans. Co. v. Mobile*, 143.)

5. **MUNICIPAL ORDINANCE.—THE TERM "BY-LAW"** as used in the Iowa code includes an ordinance passed by a municipality. (*State v. Omaha etc. Ry. & Bridge Co.*, 357.)

6. **MUNICIPAL ORDINANCE.—PUBLICATION IS ESSENTIAL TO THE VALIDITY** of a municipal ordinance, under a statute providing that such by-laws "shall take effect and be in force at the expiration of five days after they have been published." (*State v. Omaha etc. Ry. & Bridge Co.*, 357.)

7. **PUBLICATION BEING ESSENTIAL TO THE VALIDITY OF A MUNICIPAL ORDINANCE GRANTING A STREET RAILWAY FRANCHISE**, such step must be taken before the power to grant the franchise is withdrawn. (*State v. Omaha etc. Ry. & Bridge Co.*, 357.)

8. **CONSTITUTIONAL LAW—INTERSTATE COMMERCE—DISCRIMINATION BETWEEN CITIZENS.—A MUNICIPAL ORDINANCE** granting a street railway franchise to a company engaged in interstate commerce, which, in the regulation of rates, discriminates in favor of the citizens of one state as against those of another, violates the interstate commerce clause of the United States constitution. (*State v. Omaha etc. Ry. & Bridge Co.*, 357.)

9. **CONSTITUTIONAL LAW—DISCRIMINATION BETWEEN CITIZENS—UNIFORM OPERATION OF LAWS.—A MUNICIPAL ORDINANCE** granting a street railway franchise which, in the regulation of fares, does not operate uniformly upon all citizens of the state, is unconstitutional. (*State v. Omaha etc. Ry. & Bridge Co.*, 357.)

10. **MUNICIPAL CORPORATIONS—DUTY TO PASS AND ENFORCE ORDINANCES.**—A municipal corporation invested with power must not only enact such ordinances as are necessary to protect the lives, limbs, and property of its citizens, and prevent, suppress, and abate all nuisances and obstructions in its streets, but it must also exercise all reasonable care and diligence in the enforcement thereof. (*Mayor of Hagerstown v. Klotz*, 437.)

11. **MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY BY BICYCLE.**—If a municipality, after passing an authorized ordinance prohibiting the riding of bicycles in the streets at an immod-

erate rate of speed, makes no effort to enforce it, and negligently permits such riding without interference upon a certain street until it becomes a nuisance dangerous to pedestrians thereon, the city is liable to a pedestrian, who, while exercising due and reasonable care, is knocked down and injured by a bicycle propelled with great speed upon such street. (Mayor of Hagerstown v. Klotz, 437.)

12. MUNICIPAL CORPORATIONS—ORDINANCE AUTHORIZING OBSTRUCTION OF LIGHT AND AIR.—A city in the exercise of its right of control over streets can pass ordinances only for the benefit of the public, and not to promote a mere private interest. Hence it cannot authorize a private individual in his own interest to obstruct the light and air from the street, to the injury of abutting lot owners. (Townsend v. Epstein, 441.)

13. CONSTITUTIONAL LAW—LOTTERY TICKETS.—A municipal ordinance making it unlawful for any person to have in his possession any lottery ticket is valid, if the constitution of the state empowers municipalities to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. (Ex parte McClain, 243.)

14. CONSTITUTIONAL LAW—LICENSE TAX—CLASSIFICATION OF MERCHANTS.—A municipal ordinance classifying wholesale and retail merchants for the purposes of a municipal license tax is valid, and does not violate any constitutional provision, either national or state, and under such classification different rates of tax may be imposed upon the several classes as established by such ordinance. (Commonwealth v. Clark, 694.)

15. CONSTITUTIONAL LAW—MUNICIPAL INDEBTEDNESS. A municipality already in debt up to its constitutional limit cannot, without a vote of the electors, enter into a contract for the building of a viaduct without expense to itself, but which will make it liable for damages to the owners of abutting land. (Keller v. Scranton, 708.)

16. CONSTITUTIONAL LAW.—UNLIQUIDATED DAMAGES TO LAND OWNERS from a public improvement are a "debt" within the meaning of constitutional provisions limiting municipal indebtedness. (Keller v. Scranton, 708.)

17. CONSTITUTIONAL LAW—MUNICIPAL INDEBTEDNESS. The words "debt" and "indebtedness," used in constitutional provisions relating to the limit of municipal indebtedness, are not used in any technical way, but in their broad general meaning of all contractual obligations to pay in the future for considerations received in the present. (Keller v. Scranton, 708.)

18. CONSTITUTIONAL LAW—MUNICIPAL INDEBTEDNESS. Taking land by eminent domain proceedings is outside the principle that makes municipalities liable for their wrongful acts, without regard to their indebtedness, and within the constitutional prohibition of a contractual obligation to pay in future for a consideration received in the present. (Keller v. Scranton, 708.)

See Interstate Commerce, 3-6; Injunctions, 7-10.

MURDER.

See Homicide.

NAVIGABLE WATERS.

See Waters and Watercourses.

NEGLIGENCE.

NEGLIGENCE.--NONPERFORMANCE OF A DUTY COMMANDED BY A STATUTE, resulting in injury to another. is negligence as a conclusion of law. (Chicago etc. R. R. Co. v. Mochell, 818.)

See Damages; Electrical Company; Independent Contractor; Railroads.

NEGOTIABLE INSTRUMENTS.

1. PROMISSORY NOTE, WHO DEEMED TO BE MAKERS.—ALL WHO SIGN THEIR NAMES ON THE BACK OF A PROMISSORY NOTE BEFORE DELIVERY are makers, whether it is negotiable or not. (Dow Law Bank v. Godfrey, 559.)

2. NEGOTIABLE INSTRUMENTS, WHEN SEVERAL AS WELL AS JOINT.—If an instrument worded in the singular is executed by several, the obligation is joint and several. (Dow Law Bank v. Godfrey, 559.)

3. NEGOTIABLE INSTRUMENTS—ACCOMMODATION MAKERS.—Lack of authority of an officer of a corporation to execute a note in its name payable to himself, though a good defense as to the corporation, is no defense for accommodation makers, who, as officers of the corporation, and with notice of such lack of authority, sign the note to give it currency. (Klein v. German Nat. Bank, 183.)

4. NEGOTIABLE INSTRUMENTS—DIVERSION OF PROCEEDS.—ACCOMMODATION SURETIES who trust the maker with a note payable to his own order, upon which to raise money, trust him to make a proper application of the proceeds, and are not released if he diverts the fund thus obtained to a wrongful purpose, without notice. at the time, on the part of the person advancing the fund of his intention to wrongfully divert it. (Klein v. German Nat. Bank, 183.)

5. NEGOTIABLE INSTRUMENTS—DIVERSION OF PROCEEDS.—If an accommodation note of a corporation is made payable to its president, the fact that a bank advancing funds on the note places the amount to such president's credit does not show that the bank has notice of his intention to divert the proceeds to a wrongful purpose. (Klein v. German Nat. Bank, 183.)

See Alteration of Instruments.

NOVATION.

NOVATION.—WHETHER A NEW SECURITY constitutes a novation of a prior indebtedness is a matter of intention, and the burden of proof rests upon him who asserts that there has been such novation to establish it. (State Bank v. Domestic etc. Co., 891.)

NOXIOUS GRASS.

See Nuisances, 3, 4.

NUISANCES.

1. PRIVATE NUISANCE—LIABILITY OF GRANTEE.—The grantee of land on which is a private nuisance is not answerable for continuing it, unless he has had notice to abate, or at least until he has had knowledge that it is a nuisance and injurious to the rights of others. (Leahy v. Cochran, 506.)

2. PUBLIC NUISANCE—LIABILITY OF GRANTEE.—A property owner who maintains a public nuisance on the sidewalk is liable to one sustaining personal injuries therefrom, though the nuisance existed when he became the owner of the premises and he had not been requested to reform it. (*Leahan v. Cochran*, 506.)

3. NUISANCE—RIGHT TO USE LAND.—In determining to what uses land may properly be put by its owner, with reference to neighboring lands, the importance of the use to the owner, as well as the extent of the damage to be inflicted upon his neighbor, must be taken into consideration, and the rights of the parties adjusted in a practical way, the question being whether the proposed use is a reasonable one under all of the circumstances. (*Gulf etc. Ry. Co. v. Oakes*, 835.)

4. NUISANCE—RIGHT TO PLANT GRASS OR CROPS INJURIOUS TO ADJOINING LAND.—The mere spreading to neighboring lands of Bermuda grass planted by a railway company upon its right of way does not render the company liable for the damages caused thereby, in the absence of proof that the planting of such grass was an unjustifiable use of the property, or that a person of ordinary prudence would not have so planted it. (*Gulf etc. Ry. Co. v. Oakes*, 835.)

See Injunctions, 3.

OFFICERS.

1. PUBLIC OFFICERS.—THE HOLDING OF ONE OFFICE DOES NOT RENDER THE INCUMBENT INELIGIBLE TO ANOTHER AND INCOMPATIBLE OFFICE. for his acceptance of a second office must result in his vacating the first. (*Attorney General v. Oakman*, 574.)

2. PUBLIC OFFICERS, TERM OF.—THE LEGISLATURE MAY FIX the term of officers other than those provided for in the state constitution. (*Attorney General v. Oakman*, 574.)

3. PUBLIC OFFICERS.—AN APPOINTMENT TO OFFICE CANNOT BE RECALLED after the appointing power has once exercised its functions. (*Attorney General v. Oakman*, 574.)

4. PUBLIC OFFICERS—RECONSIDERATION OF SENATE'S CONSENT TO APPOINTMENT OF.—The vote of the Senate that it advise and consent to an appointment to office made by the governor is subject to reconsideration at the same session. (*Attorney General v. Oakman*, 574.)

5. OFFICERS—VACATING.—THE FAILURE OF AN OFFICER TO RENEW HIS BOND within the time prescribed by statute does not per se vacate the office, but he remains an officer with a defeasible title until a judgment of forfeiture is pronounced. (*Bullock v. State*, 662.)

6. OFFICIAL BOND, SURETIES ON, WHEN SUBJECT TO PUNITIVE DAMAGES.—If a statute declares that a justice of the peace shall, with his sureties, be liable on his official bond for any misconduct of a person appointed by him as special constable, and that any official selling exempt property shall forfeit to the judgment debtor double its value, the sureties, as well as the justice himself, are liable for double the value of exempt property sold by such special constable. (*State v. Allen*, 29.)

See Indemnity Bond; Injunction, 2; Process.

PARTNERSHIP.

See Subrogation, 2.

PHOTOGRAPHS.

See Evidence, 7-9.

PLEADING AND PRACTICE.

1. **PLEADING.**—IF NO DISPOSITION SEEMS TO HAVE BEEN MADE OF A DEMURRER to a bill, it is to be regarded as overruled. (Miller v. Black Rock etc. Co., 924.)

2. **THE AMENDMENT OF PLEADINGS TO CONFORM TO THE FACTS PROVEN** is authorized only when it does not substantially change the defense. (Shawyer v. Chamberlain, 411.)

3. **PLEADING NONDISCOVERY OF FRAUD.**—In an action to quiet title against a conveyance executed by the plaintiff, his complaint alleging that in pursuance of a conspiracy between persons designated therein, he was kept in ignorance of the conveyance until a specified date sufficiently discloses that he did not discover the fraud, on account of which he relies for relief, until such date. (Loftis v. Marshall, 296.)

4. **PRACTICE.**—SPECIAL QUESTIONS need not be submitted to the jury upon immaterial, inconclusive, or admitted matters, nor when the answer cannot affect the result. (Davis v. Teachout, 531.)

POLICE OFFICER.

See Assault, 2.

PRACTICE.

See Pleading and Practice.

PROBATE HOMESTEAD.

See Homesteads, 13, 14.

PROCESS.

1. **ABUSE OF PROCESS.**—WHERE, IN THE EXECUTION OF A WRIT OF REMOVAL, a child afflicted with measles is put out of doors on a cloudy, cold, and windy day, and dies a few days later by reason of the exposure, such facts are sufficient to support a finding that there was an abuse of process. (Bradshaw v. Frazier, 394.)

2. **ABUSE OF PROCESS—CERTIFICATE OF PHYSICIAN.**—In an action to recover damages for an abuse of legal process in removing a sick child from a house, the certificate of a physician that she was able to be moved is not a complete defense as a matter of law. (Bradshaw v. Frazier, 394.)

3. **ABUSE OF PROCESS—CONTRIBUTORY NEGLIGENCE.**—Where a child dies as the result of exposure caused by the execution of a writ of removal, it is no defense that the parents were guilty of contributory negligence in caring for such child after the exposure. (Bradshaw v. Frazier, 394.)

4. **ABUSE OF PROCESS.**—ONE WHO PARTICIPATES IN THE UNLAWFUL ACTION of a constable in executing a writ of removal is responsible for its consequences. (Bradshaw v. Frazier, 394.)

PROHIBITION, WRIT OF.

WRIT OF PROHIBITION—JURISDICTION.—In a proceeding in the supreme court by writ of prohibition to prevent the enforcement by a probate court of an order of distribution against an executor, the court can review only questions of the jurisdiction of the probate court, and it cannot consider questions of error in refusing to allow such executor credits and in charging him with certain items, or whether another writ of prohibition in another court is *res judicata* or not. (*State v. Henderson*, 618.)

PUBLICATION.

PUBLICATION IN AN EXTRA EDITION of fifty or one hundred copies issued at 11 o'clock at night, and only distributed to a few persons directly interested, is not an official publication as required by law. (*State v. Omaha etc. Ry. & Bridge Co.*, 357.)

PUBLIC LANDS.

PUBLIC LANDS—SHORES AND BEDS OF STREAMS.—Under the compact by which Alabama was admitted to the Union, the title to all lands not reserved to the United States became the property of the state, and there was no reservation in the shores and beds of navigable streams. (*Mobile Trans. Co. v. Mobile*, 143.)

PUBLIC POLICY.

PUBLIC POLICY.—WITHIN THEIR OWN SPHERE STATES have a public policy as separate commonwealths, which the courts of each state regard and enforce, distinct from questions of policy affecting the nation at large. (*Union Strawboard Co. v. Bonfield*, 346.)

QUIETING TITLE.

See Judgments, 7; Pleading, 3.

RACE DISCRIMINATION.

See Constitutional Law, 1; Trial.

RAILROADS.

1. RAILROADS — DAMAGES — INCONVENIENCE TO PASSENGER.—A railroad company is liable in actual damages for the inconvenience caused a passenger by being put off the train in the inclosed part of the railroad track so that she is compelled to pass a cattle-guard at night in order to reach a public crossing where she wished to alight. (*St. Louis etc. Ry. Co. v. Bragg*, 206.)

2. DAMAGES FOR FRIGHT AND NERVOUS SHOCK.—A railroad company is not liable in damages for the consequences of fright and nervous shock to a passenger, unaccompanied by any immediate physical injury, sustained by the unintentional negligence of the company in putting such passenger off the train in the inclosed part of the railroad track, so as to compel her to pass a cattle-guard on a dark night in order to reach a public crossing where she wished to alight. (*St. Louis etc. Ry. Co. v. Bragg*, 206.)

3. NEGLIGENCE—RAILROAD'S DUTY TO LOOK AND LISTEN.—One about to cross a railroad track must look and listen, and if there are any difficulties in the way of his seeing and hearing must stop, and if, by acting in accordance with such duty he could

have discovered the approach of the train, he is guilty of negligence contributing to any injury received from a failure to perform such duty. (Weller v. Chicago etc. R. R. Co., 592.)

4. **NEGLIGENCE—RAILROADS.—IT IS PRESUMED** that a person about to cross a railroad track looks, listens, and exercises proper care. (Weller v. Chicago etc. R. R. Co., 592.)

5. **NEGLIGENCE—RAILROADS—PRESUMPTIONS.—A** person about to cross a railroad track has a right to presume that the company will obey an ordinance of the city requiring headlights on moving trains after sunset, and that a bell be rung on the engine on all such trains eighty rods from the crossing and be kept ringing until the train has passed such crossing, and he is entitled to recover for an injury received at such crossing, unless it conclusively appears that he was guilty of contributory negligence. (Weller v. Chicago etc. R. R. Co., 592.)

6. **NEGLIGENCE—RAILROADS.—TO OVERCOME THE PRESUMPTION** that a person about to cross a railroad track exercised due and proper care, and to defeat his action for an injury received, the burden of proof is upon the railroad company to show a failure on his part to exercise ordinary care to avoid the injury and that his failure to exercise such care was the proximate, direct, and immediate cause of the injury, without which it would not have been received. (Weller v. Chicago etc. R. R. Co., 592.)

7. **NEGLIGENCE—RAILROADS—EVIDENCE.—**Before it can be declared as matter of law that a person attempting to cross a railroad track is guilty of negligence contributing to his injury, the evidence must be substantially all one way, and not such that reasonable minds might differ with respect thereto. (Weller v. Chicago etc. R. R. Co., 592.)

8. **NEGLIGENCE.—A PASSENGER LAWFULLY UPON A STREET-CAR** is not chargeable with contributory negligence if injured by a collision with a railroad train at a street crossing. (Chicago etc. R. R. Co. v. Mochell, 318.)

9. **NEGLIGENCE OF RAILWAYS—INJURY TO STREET-CAR PASSENGER.—**In the event of a collision between a street-car and a railroad train at a crossing a verdict in favor of an injured street-car passenger must stand as against the railroad company, if a finding that the injury resulted from the combined negligence of the employes of the two companies is justified by the evidence. (Chicago etc. R. R. Co. v. Mochell, 318.)

10. **NEGLIGENCE—PROHIBITED SPEED OF TRAINS.—**The running of a railroad train, through a city in excess of the speed authorized by ordinance is negligence, as matter of law. (Chicago etc. R. R. Co. v. Mochell, 318.)

11. **STREET RAILWAY—INJURY FROM PASSING VEHICLE.** Street-car companies are not negligent in not providing a means of warning passengers about to leave a car of the danger of colliding with other vehicles. The risk of being hurt by such vehicles is the risk of the passenger. The danger is not one against which the carrier is bound to protect the passenger or to give him warning. (Oddy v. West End St. Ry. Co., 482.)

See Carriers; Release.

RECEIVERS.

1. **A FOREIGN RECEIVER MAY MAINTAIN AN ACTION** to recover real property in the possession of a resident of the

state, where the rights of domestic creditors are not involved. (Small v. Smith, 808.)

2. **THE CONTRACTS OF A RECEIVER**, made with express or implied authority, cannot be annulled at the pleasure of the court. (State Bank v. Domestic etc. Co., 891.)

3. **RECEIVERS—POWERS AND DUTIES OF ACTIVE AND PASSIVE**.—The powers of active receivers, to whom are confided the management of going concerns, are necessarily much broader than the powers of passive receivers, who merely preserve the property, collect the assets, and report the fund to the court for distribution. (State Bank v. Domestic etc. Co., 891.)

4. **RECEIVERS—TRANSACTIONS WITH BANK**.—Where a receiver hypothecates securities as collateral to protect notes discounted for him by a bank, such collaterals become the property of the bank; and if they are delivered to him to collect, the avails to be deposited to his credit in the bank as trustee, and he applies the collections to current expenses of the receivership, he should make restitution to the bank out of other funds. (State Bank v. Domestic etc. Co., 891.)

5. **RECEIVERSHIP—PRIORITY OF CREDITORS**.—A bank's demand against a concern in the hands of a receiver, in excess of notes it has discounted for him and which are protected by collaterals, evidenced by receiver's certificates, does not stand on a different footing from, nor is it entitled to precedence over, the claims of other creditors of the same class. (State Bank v. Domestic etc. Co., 891.)

RECOUPMENT.

See Setoff and Recoupment.

REFERENDUM.

See Constitutional Law, 2.

RELEASE.

1. **RELEASE FOR PERSONAL INJURY**.—If a person who has a claim against another for personal injuries agrees upon a release and settlement of his claim, and accepts a sum of money or other thing of value in such settlement, he is, in the absence of fraud or concealment, concluded by the settlement, notwithstanding the future development of other injuries from the same cause. (Houston etc. R. R. Co. v. McCarty, 854.)

2. **RELEASES—SUBSEQUENTLY DEVELOPED INJURY—MISTAKE**.—A contract of release in full of all damages which have accrued, or which may thereafter accrue, for personal injuries received in an accident is binding as to all injuries developed as the result thereof, whether known or unknown at the time when the contract is made, and it cannot be avoided on the ground of mistake in the belief that only certain injuries had been received, so as to permit recovery for other injuries developed after its execution and for which no adequate compensation was made. (Houston etc. R. R. Co. v. McCarty, 854.)

RELIGIOUS SOCIETY.

See Benefit Society, 10, 11.

RES GESTA.

See Evidence, 14, 15.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgments, 7-11.

RESTRAINT OF TRADE.

See Contracts, 2-5.

SALES.

1. **SALE—RECOVERY FOR PARTIAL DELIVERY.**—If a contract of sale is entered into, and the seller delivers a part only of the goods contracted for, the vendee, by accepting and retaining such part, waives the condition precedent of the delivery of the balance, and the vendor may recover for the goods delivered and retained. (Ontario etc. Assn. v. Cutting Fruit etc. Co., 231.)

2. **SALE—IMPOSSIBILITY OF PERFORMANCE OF CONTRACT OF.**—If a contract is for the sale of specified varieties of fruit growing and to be grown in designated orchards, which are afterward so affected by drought that they do not produce sufficient to comply with the contract, the vendor can be compelled to perform so far only as it is possible for him to do so, nor is he answerable for the failure to comply with the contract, not attributable to any fault on his part. (Ontario etc. Assn. v. Cutting Fruit etc. Co., 231.)

3. **SALE—COMPELLING SUBSTITUTION OF OTHER ARTICLES.**—If a vendor, through no fault of his, is unable to deliver fruit of a specified variety, he cannot be compelled to supply another. This would be substituting a new sale, rather than complying with the original contract. (Ontario etc. Assn. v. Cutting Fruit etc. Co., 231.)

4. **CONDITIONAL SALE—DESTRUCTION OF PROPERTY.**—When personal property is sold and delivered under an agreement that the title is to remain in the vendor until payment, and it is destroyed without fault of the vendee, the loss falls on the vendor. (Bishop v. Minderhout, 134.)

See Damages, 3.

SEARCH-WARRANTS.

SEARCH-WARRANTS—DESCRIPTION OF PROPERTY.—A search-warrant commanding the seizure of "gambling implements and apparatus used, kept, and provided to be used in unlawful gambling" on certain premises and in a certain building, is sufficiently definite in its description of the property to be seized. (Frost v. People, 352.)

SELF-DEFENSE.

See Homicide, 1-4.

SETOFF AND RECOUPMENT.

SETOFF AND RECOUPMENT.—ON A BILL TO ENFORCE A VENDOR'S LIEN, the vendee cannot recoup or set off damages sustained by the vendor's failure to collect a note given as collateral security for the payment of purchase money notes, without showing that such damages have been sustained and the amount thereof. (Hood v. Hammond, 159.)

SHERIFF.

See Indemnity Bond.

SLANDER.

1. **SLANDER.—A COMMUNICATION MAY BE PRIVILEGED** and not constitute slander, though it charges one with crime. (Ross v. Ward, 746.)

2. **SLANDER—ACCUSING OF CRIME.—A CHARGE OF THE COURT** that an elector is not at liberty to accuse a party of crime under any circumstances, unless he can justify it by proving the truth of the charge, is erroneous. (Ross v. Ward, 746.)

3. **SLANDER.—A COMMUNICATION BONA FIDE** upon any subject in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminal matter which without the privilege would be slanderous. (Ross v. Ward, 746.)

4. **SLANDER—QUESTION OF PRIVILEGE.—AN INSTRUCTION**, in an action for slander for accusing one of crime, omitting the question of privilege, and assuming, in effect, that the defendant admits in his pleadings that the charge was false and that he knew it to be false when he makes no such admission, is erroneous. (Ross v. Ward, 746.)

5. **SLANDER—PROVINCE OF COURT AND JURY.—The court** may direct the jury by stating to them what constitutes a privileged communication as laid down by the law, but whether or not the communication is privileged is a matter for the jury. (Ross v. Ward, 746.)

6. **SLANDER—CANDIDATE FOR OFFICE.—An elector and taxpayer** is justified in stating to other electors and taxpayers that a candidate for alderman is a thief, if he makes the statement in good faith, without malice, and in a belief, with reason therefor, of its truth. (Ross v. Ward, 746.)

STATUTE OF FRAUDS.

STATUTE OF FRAUDS.—WHILE A SUBSEQUENT MEMORANDUM or act satisfying the statute of frauds may relate to the date of the oral agreement so far as the parties are concerned, it does not retroact so as to affect third persons. (Emery v. Boston Terminal Co., 473.)

See Landlord and Tenant, 1, 2; Vendor and Vendee, 2, 3.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STREET RAILWAYS.

See Railroads, 8-11.

SUBROGATION.

1. **THE DOCTRINE OF SUBROGATION IS INDEPENDENT** of contractual relations, and involves the principle that if one secondarily liable has paid the debt of another primarily liable therefor, he will, in equity, be substituted to the rights and remedies of the creditor against the party whose liability he has been compelled to discharge. (Sands v. Durham, 884.)

2. **THE DOCTRINE OF SUBROGATION COVERS** every instance in which one party has been required to pay a debt for which another is primarily answerable, and which in equity and good conscience ought to be discharged by the latter. (Sands v. Durham, 884.)

3. **SUBROGATION.—A PARTNER, WHO HAS PAID JUDGMENTS** for firm debts recovered against the members of the firm after its dissolution and the exhaustion of its social assets, is entitled to be subrogated to the rights of the judgment creditors against the real estate of his copartner, in the hands of a subsequent purchaser, to the extent his payments exceed his proportion of the liability. (Sands v. Durham, 884.)

See Homesteads, 5, 6.

SUICIDE.

See Benefit Society, 1.

SUPERSEDEAS.

See Judgment, 1.

SUPERVISORS.

1. **SUPERVISORS—ALLOWANCE OF CLAIMS BY, WHEN VOID.—IF** a statute prescribes the salary of a county clerk, and declares that he shall not be allowed any additional sum for new duties, and that he must perform all duties which the board of supervisors may require, a resolution of that board awarding him compensation for his services as clerk of one of its subcommittees is ultra vires and void. (County of Wayne v. Reynolds, 541.)

2. **SUPERVISORS—RECOVERY OF CLAIMS UNLAWFULLY ALLOWED BY.—If** a board of supervisors allows a claim which cannot constitute a charge against the county, such allowance is void; and if the claim is paid, an action may be sustained by the county to recover the amount of such payment. (County of Wayne v. Reynolds, 541.)

SURETYSHIP.

SURETIES—CONFLICT OF LAWS.—THE LAW AT THE TIME OF THE EXECUTION OF A CONTRACT OF SURETYSHIP is a part of it, and the sureties are bound accordingly, and so remain notwithstanding a subsequent change in such law. (State v. Allen, 29.)

See Officers, 5, 16.

SURFACE SUPPORT.

See Mines and Mining, 4-11.

TAXATION.

1. **CORPORATE STOCK, SITUS OF.**—Shares of stock in a foreign corporation owned by nonresidents have their situs here for the purposes of taxation. (Bacon v. Board of State Tax Commrs., 524.)

2. **THE TAXATION OF SHARES OF STOCK IN A FOREIGN CORPORATION** may be in any state in which the owner of such stock resides, though shares of stock in domestic corporations are not taxed to their owners, and all the property of such foreign corporation is taxed in the state of which it is a citizen, and its shares of stock are not there taxable to their owners. (Bacon v. Board of State Tax Commrs., 524.)

3. **CITIZEN, WHEN SYNONYMOUS WITH INHABITANT.**—A statute declaring that, for the purposes of taxation, personal property includes all shares of stock in foreign corporations, except national banks owned by citizens of this state, does not restrict such taxation to citizens. The word, as here employed, is synonymous with inhabitants. (Bacon v. Board of State Tax Commrs., 524.)

4. **STATUTES, CONSTRUCTION OF.**—TAX LAWS should be liberally construed in favor of the state. (Bacon v. Board of State Tax Commrs., 524.)

5. **CONSTITUTIONAL LAW.**—The taxation of shares of stock in foreign corporations, when owned by citizens of this state, is not prohibited by section 1 of article 4 of the constitution of the United States, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. (Bacon v. Board of State Tax Commrs., 524.)

6. **CONSTITUTIONAL LAW.**—The right to tax shares of stock in foreign corporations owned by residents of this state does not depend on whether the capital of the corporation is or is not taxed in the state under whose laws it was created. (Bacon v. Board of State Tax Commrs., 524.)

7. **CONSTITUTIONAL LAW—OCCUPATION TAX.**—The state may tax any occupation for the purpose of raising revenue, and such tax may be laid and collected in the form of a license fee. (Price v. People, 306.)

8. **CONSTITUTIONAL LAW—OCCUPATION TAXES—LIMITATIONS UPON.**—A constitutional provision giving the legislature authority to tax certain enumerated occupations for the purpose of raising revenue does not limit such power to the particular occupations specified. (Price v. People, 306.)

9. **CONSTITUTIONAL LAW—OCCUPATION TAX—POLICE POWER—LICENSE OF OCCUPATIONS.**—The state may, in the exercise of the police power, provide that any occupation properly subject to such power shall not be followed except under license issued by public authority upon the payment of a fee and the execution of a bond conditioned in accordance with the provision of the statute. (Price v. People, 306.)

10. **CONSTITUTIONAL LAW.—WHAT OCCUPATIONS MAY BE TAXED** under the police power by a statute requiring a license is a judicial question. (Price v. People, 306.)

11. **CONSTITUTIONAL LAW.—PRIVATE EMPLOYMENT AGENCIES** conducted for hire may be subjected to a license fee or tax. (Price v. People, 306.)

12. **CONSTITUTIONAL LAW — OCCUPATION TAX.**—The amount determined by the legislature to be paid as an occupation

license fee is conclusive, except when it is manifest that the fee has been established, not to regulate the occupation, but to raise revenue under the guise of the police power, or by means of oppressive license fees, to deprive one of the right to exercise a lawful calling. (*Price v. People*, 806.)

See Judgments, 9; License Tax.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—GRATUITOUS SERVICE.—If a telegraph company accepts a message for transmission without compensation, it is not necessary for the receiver of the message to allege and prove as a prerequisite to his right to recover for negligent delay in its delivery payment or obligation to pay for its transmission. (*Western Union Tel. Co. v. Snodgrass*, 851.)

2. TELEGRAPH COMPANIES—GRATUITOUS SERVICE—NEGLIGENT DELAY.—If a telegraph company accepts a message for transmission without compensation, having the right to charge toll therefor, a want of consideration is no defense to an action for damages arising out of its negligence in failing to deliver it. (*Western Union Tel. Co. v. Snodgrass*, 851.)

TELEPHONE.

See Evidence.

TELEPHONE COMPANY.

See Interstate Commerce.

THREATS.

See Homicide, 7.

TIMBER.

See Attachment and Garnishment, 1; *Lis Pendens*, 2.

TITLE OF STATUTE.

See Constitutional Law, 7-11.

TRADEMARKS.

1. TRADEMARK—ORIGINALITY.—The right to a trademark does not depend on originality, even as against the originator of the characteristic use. (*Burt v. Tucker*, 499.)

2. TRADEMARK—WHEN ESTABLISHED.—Where for two years, in his jobbing and general retail trade, a shoe manufacturer used a certain mark, not to designate a particular style, but to cover a wide range of shoes, and used other marks, but mostly for special goods for particular houses, such mark becomes the general one for his goods. (*Burt v. Tucker*, 499.)

3. TRADEMARK—ABANDONMENT AND RESUMPTION.—Where one has discontinued his business for four years, during which time others have used his trademark, he may be entitled as against them to resume its use. (*Burt v. Tucker*, 499.)

4. TRADEMARK—CHANGE IN FORM AND USE.—If a manufacturer of shoes acquires the word "Knickerbocker" as a trademark, confining it mainly to the form "Knickerbocker School Shoes,"

then goes out of business, and subsequently becomes a seller of shoes for another as a jobber, and resumes the use of the name, dropping the word "School" from it, and adopting "Knickerbocker Shoe Company" as the title of his concern, such use is within the scope of his original acquisition. (*Burt v. Tucker*, 499.)

TRIAL.

1. **TRIAL—ARGUMENT OF COUNSEL—REVIEW ON APPEAL.**—Appellate courts do not reverse judgments for mere misstatements of law or fact on the part of counsel, but the trial court should not permit incorrect or misleading statements of law to be made by counsel, and where timely objection is made to such statements, and the court refuses to interfere, the party excepting to such ruling may have it reviewed on appeal. (*Elder v. State*, 220.)

2. **JURY TRIAL—CHOICE BETWEEN METHODS.**—A party, in either a civil or criminal case, has no vested or legal right to choose which of two methods provided by law for the selection of juries for the trial of a case shall be adopted by the court. (*Bullock v. State*, 668.)

3. **JURY—PANEL.**—UPON THE TRIAL OF A COLORED MAN the absence of negroes from the panel of jurors is not error in the absence of proof that this exclusion was done designedly, or that such persons were omitted otherwise than in the same way that white citizens not selected were omitted. (*Bullock v. State*, 668.)

4. **TRIAL—ORDER OF EVIDENCE.**—The order in which testimony shall be introduced is almost entirely within the discretion of the court, and error committed in the order of its introduction does not justify a reversal of the judgment, especially when such error is not prejudicial. (*Weller v. Chicago etc. R. R. Co.*, 592.)

TRUST.

See Executions, 1.

VENDOR AND VENDEE.

1. **VENDOR AND VENDEE—CONSIDERATION, RECOVERY OF.**—The right of a vendee of land under an oral contract of purchase to recover a consideration paid is confined to those cases in which the vendor has refused or become unable to carry out the contract, the vendee having performed, or offered to perform, on his part. (*Laffey v. Kaufman*, 283.)

2. **VENDOR AND VENDEE—STATUTE OF FRAUDS.**—If an agreement for the sale of lands is reduced to writing and signed by the vendor alone, and delivered to the vendee, it is sufficient to take the case out of the operation of the statute of frauds, and it is not necessary that the notice of election to take by the vendee should be in writing. (*Brodhead v. Reinbold*, 735.)

3. **VENDOR AND VENDEE—PAROL EVIDENCE OF AGENCY.**—If a contract for the purchase of land is made by a husband in his own name, the fact that he acted as agent for his wife may be shown by parol evidence. (*Brodhead v. Reinbold*, 735.)

4. **VENDOR AND VENDEE—HUSBAND AS AGENT OF WIFE—RECOGNITION OF AGENCY.**—If a contract for the purchase of land is made by a husband in his own name while acting as agent for his wife, the fact that the vendor thereafter accepts payments from the wife on such contract for a long series of months

will constitute a recognition by him of the wife as the real purchaser. (Brodhead v. Reinbold, 735.)

5. **VENDOR AND VENDEE—NOTICE OF EQUITABLE OWNER.**—A person who takes conveyance to the legal title to land with knowledge that his grantor has agreed to sell it to another person, takes it subject to the equitable estate already vested in the purchaser. (Brodhead v. Reinbold, 735.)

6. **VENDOR AND VENDEE—DEFERRED PAYMENTS.**—A vendor who by his own acts has deprived himself of the power of fulfilling his contract of sale cannot require the vendee to make further payments to him. (Brodhead v. Reinbold, 735.)

7. **VENDOR'S LIEN—EVIDENCE OF RETENTION.**—The fact that purchase money notes recite their consideration to be the sale of lands, and that the deed describes such notes as a consideration for the lands conveyed, evidences an intention that a vendor's lien should be retained. (Hood v. Hammond, 159.)

8. **VENDOR'S LIEN—WAIVER BY TAKING COLLATERAL.** If a vendee reconveys lands, and transfers a purchase money note of the subvendee to the original vendor as collateral security for the payment of the original purchase money notes, the vendor does not, by accepting such security, waive his lien, where he had an agreement with his vendee as to how the lien might be waived, which the transfer of the note did not impair. (Hood v. Hammond, 159.)

9. **VENDOR'S LIEN—LIMITATION OF ACTIONS.**—A vendor's lien for the purchase money of lands is preserved, though the statute of limitations has barred the recovery of the purchase money as a debt. (Hood v. Hammond, 159.)

10. **VENDOR'S LIEN—WHEN NOT BARRED.**—The failure of a vendor to present his purchase money notes to the administrator of his vendee within the time required by the statute of nonclaim, or to file them in the probate court within nine months after the declaration of the insolvency of the estate, does not cut off his vendor's lien. (Hood v. Hammond, 159.)

See Deeds; Setoff and Recoupment.

VENUE

TRIAL—CHANGE OF VENUE.—A provision in a statute that "any party to a civil action" may obtain a change of venue does not mean that any individual party may obtain such order, but refers to the parties as a class and includes all on that side. To be entitled to such change they must all join in or favor the application, with the exception of mere nominal or formal parties having no real interest. (Klein v. German Nat. Bank, 183.)

VESTED RIGHT.

See Constitutional Law, 4-6.

WAREHOUSEMEN.

1. **WAREHOUSEMEN—BURDEN OF PROOF.**—If liquor is stored in a warehouse, and it is subsequently found that there has been excessive loss, apparently from leakage, the burden of proof is on the bailor to show that the leakage was caused by the fault of the bailee. (Taussig v. Bode, 250.)

2. CONTRACT—NOTICE, WHEN A PART OF.—IF ON THE MARGIN OF A WAREHOUSE RECEIPT for casks of spirits received for storage is printed a notice, "Loss or damage by fire, the elements, shrinkage, leakage, or natural decay at the owner's risk," such notice is a part of the contract. (Taussig v. Bode, 250.)

3. CONTRACT, PRESUMPTION THAT PARTY READ.—If a notice is printed on the face of a brief warehouse receipt, the presumption is that the party to whom it was given read it, as it was his duty to do. (Taussig v. Bode, 250.)

4. WAREHOUSEMEN, WHEN RELEASED FROM LIABILITY BY NOTICE ON RECEIPT.—If a warehouse receipt has a notice printed on its face declaring that leakage is at the owner's risk, when he stores spirits in casks and accepts such receipt, it is a warning that loss by leakage is at his risk, and he cannot recover of the warehouseman therefor, if not due to the fault of the latter. (Taussig v. Bode, 250.)

5. WAREHOUSEMEN ARE RELEASED FROM THE DUTY OF INSPECTING CASKS of spirits in storage with them for the purpose of detecting leakage by a notice on their receipt declaring leakage to be at the owner's risk. By such notice the duty of making such inspection must be performed by the bailor. (Taussig v. Bode, 250.)

6. WAREHOUSEMAN'S LIABILITY—RIGHT OF TO LIMIT.—There is no public policy forbidding a warehouseman from limiting his liability for loss or deterioration caused by the inherent qualities in the articles stored or by defects in the vessels containing them. (Taussig v. Bode, 250.)

7. WAREHOUSEMEN.—The piling or arranging of casks so as to make their inspection difficult cannot constitute a ground of recovery against a warehouseman, where the duty of making such inspection rests on the bailor, who never attempts to perform it. (Taussig v. Bode, 250.)

8. WAREHOUSEMAN DOES NOT OWE THE DUTY, when casks of spirits are stored with him by their owner, who has been negligent or has used defective cooperage, to use ordinary care to discover or prevent leakage, when his receipt declares that leakage is at the owner's risk. (Taussig v. Bode, 250.)

WATERS AND WATERCOURSES.

1. SUBSURFACE WATERS WHICH HAVE NO DEFINITE CHANNEL belong to the realty where found, and are not subject to the law governing riparian rights. (Miller v. Black Rock etc. Imp. Co., 924.)

2. SUBSURFACE WATERS CAN BE THE SUBJECT OF RIPARIAN RIGHTS only when flowing in known or defined channels. (Miller v. Black Rock etc. Imp. Co., 924.)

3. PERCOLATING WATERS.—IF ONE DIGS A DITCH on his land which interrupts the percolating waters supplying his neighbor's spring, the latter has no cause of action therefor. (Miller v. Black Rock etc. Imp. Co., 924.)

4. SUBSURFACE WATERS.—ONE IS ENTITLED TO A REASONABLE USE of a well-defined subsurface stream flowing through his land, though it supplies a spring of his neighbor. (Miller v. Black Rock etc. Imp. Co., 924.)

5. NAVIGABLE WATERS.—A PATENT FROM THE UNITED STATES to lands adjoining a stream where the tide ebbs and flows

extends only to the high tide line, and does not affect the previous title of the state to the land below high-water mark. (*Mobile Trans. Co. v. Mobile*, 143.)

6. **NAVIGABLE STREAMS.—THE TITLE OF THE UNITED STATES** to the shore of a stream where the tide ebbs and flows, to the line of high tide, becomes vested in a state on its admission to the Union and cannot be affected by any subsequent grant of the United States. (*Mobile Trans. Co. v. Mobile*, 143.)

7. **NAVIGABLE WATERS.—THE SHORES OF TIDE WATER** are held in fee by the states subject only to the reservation that the streams shall be public highways with the right of Congress to regulate commerce thereon. Such fee may be conveyed by a state, subject to the right of the United States respecting navigation, particularly where the conveyance is in furtherance of public interests. (*Mobile Trans. Co. v. Mobile*, 143.)

See Public Lands.

WILLS.

WILLS—INTERPRETATION OF "FAMILY."—If a testator in his will directs his executor to care for and support a certain named person "as long as she remains a member of my family, or until she becomes twenty-one years of age," the family does not terminate by the death of the testator and his widow, so as to relieve the executor from his obligation. (*Miller v. Miller*, 919.)

WITNESSES.

1. **EVIDENCE.—EXPERT WITNESSES** may testify to the rate of speed at which a particular train of cars moved from the time or distance necessarily taken in stopping it. (*Weller v. Chicago etc. R. R. Co.*, 592.)

2. **WITNESSES.—IN THE ABSENCE OF A CLAIM OF PRIVILEGE** on the part of a witness, his evidence must be considered in reaching proper conclusions. (*Burk v. Putnam*, 372.)

3. **COMPETENCY OF WITNESSES.—THE LEGISLATURE HAS PLENARY POWER** to prescribe the competency of witnesses in all actions, limited only by express constitutional guarantees. (*Burk v. Putnam*, 372.)

4. **CONSTITUTIONAL LAW—CLASS LEGISLATION.**—A law, allowing husband and wife to testify against each other in a civil action brought by a judgment creditor to set aside a fraudulent conveyance of property between them, is not unconstitutional as being class legislation, since it applies to every person coming within the relation and circumstances provided for. (*Burk v. Putnam*, 372.)

5. **CONSTITUTIONAL LAW—WITNESS—IMMUNITY FROM PROSECUTION.**—A statute, allowing husband and wife to testify as to fraudulent conveyances of property between them, is not unconstitutional because it fails to grant immunity from criminal prosecution, as it merely fixes the competency of witnesses, and has no reference to the competency of evidence. (*Burk v. Putnam*, 372.)

6. **CONSTITUTIONAL LAW—CONTESTED ELECTIONS—CRIMINATING TESTIMONY.**—Two constitutional provisions, one providing that "in criminal prosecutions the accused cannot be compelled to give evidence against himself," and the other that "in trials of contested elections no person shall be permitted to withhold his testimony upon the ground that he may criminate himself, but such testimony shall not afterward be used against him,

In any judicial proceeding except for perjury in giving such testimony," are not in conflict. Hence a witness cannot withhold his testimony on the trial of a contested election on the ground that such testimony may criminate him. (In re Kelly's Contested Election, 719.)

7. WITNESS.—ON CROSS-EXAMINATION, A PARTY IS BOUND BY THE ANSWER OF A WITNESS on an immaterial and irrelevant matter, and cannot contradict him by other testimony. (Bullock v. State, 668.)

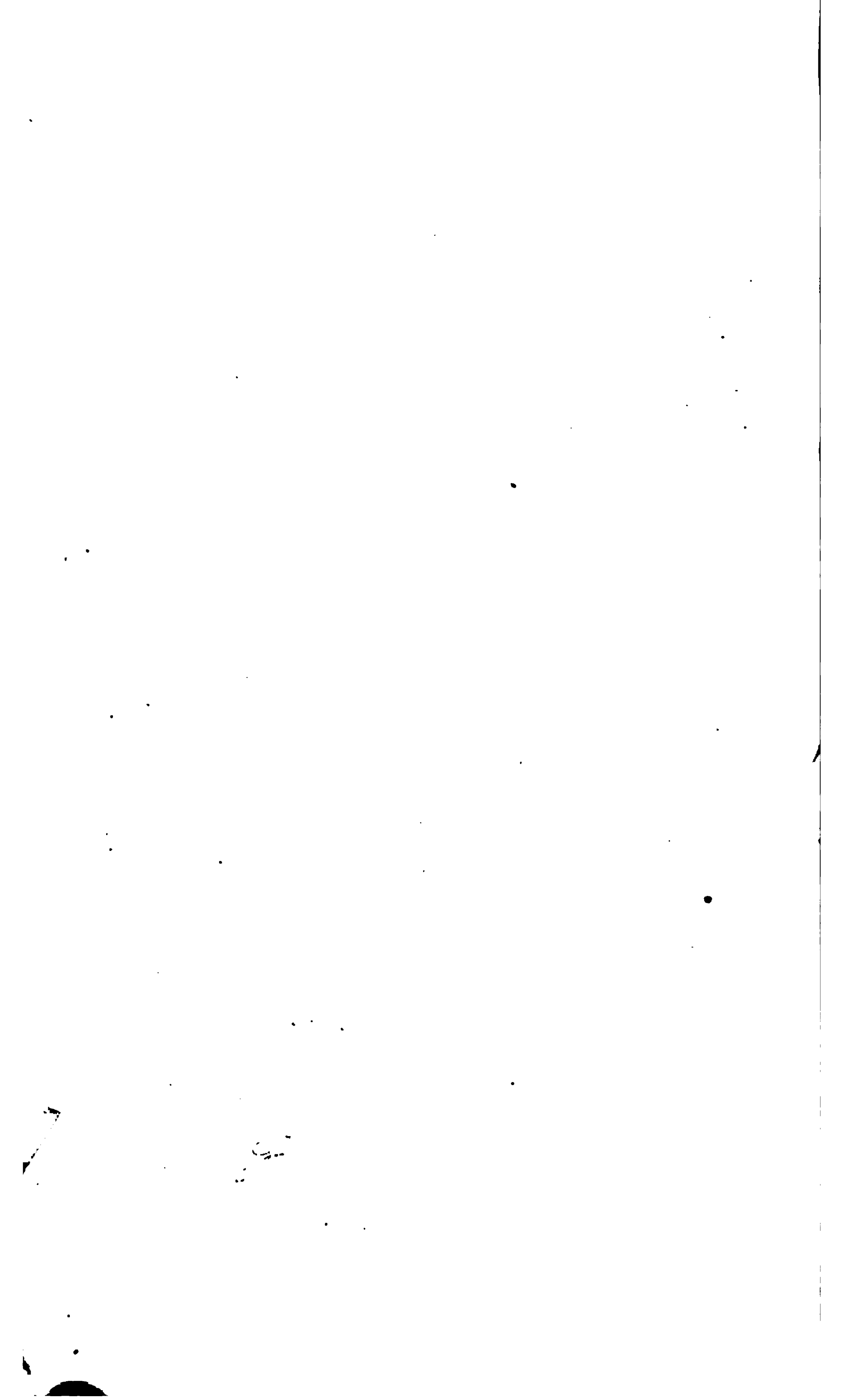
See Contempt.

WRIT OF PROHIBITION.

See Prohibition.

X-RAY PICTURES.

See Evidence, 7-9.





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